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A COMMENTARY
ON THE
LAW OF EVIDENCE
IN CIVIL ISSUES.

BY
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AGENCY, AND CRIMINAL LAW.

IN TWO VOLUMES.

VOLUME I.

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PREFACE.

THE changes in the Law of Evidence, which the following pages are designed to meet, are as follows:—

1. The admission, as witnesses, not merely of interested persons, but of parties. The first and most obvious result of this change is, that a vast mass of rulings, embracing about one sixth of the common law cases on evidence, has become useless; while in the shape of adjudications on the new statutes, we have a series of decisions which abound in important distinctions, and demand careful discussion. But the results of the rehabilitating statutes are not confined to the branch of law with which they are immediately concerned: our whole system has been sympathetically affected by the change. The doctrine of presumptions, as will hereafter be more fully shown,¹ that of intent,² that of fraud,³ and that of relevancy,⁴ are necessarily modified by so great an alteration, not merely in the form, but in the principles of jurisprudence. It is proper that these modifications should be specifically discussed.

2. The disuse of special pleading, and the almost unlimited liberty of amendment in civil issues, have rendered practically obsolete, in such issues, the old decisions on variance. These decisions, in relation to criminal trials, so far as they are still operative, I have analyzed in my work on Criminal Law. It

¹ See *infra*, §§ 460, 461.

³ *Infra*, § 853.

² *Infra*, § 482.

⁴ *Infra*, §§ 25-54.

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would be not only a cumbrous but a useless repetition, to insert them in the present treatise.

3. In England, by the recent Judicature Act, it is provided that wherever the rules of equity and of common law differ, the courts are to follow equity; and we are now told, by the highest authority, that the term "rules," in the statute, includes "doctrines."¹ Towards the same result, our American jurisprudence has moved, in those states which have distinct equity courts, with steps more or less rapid; while in other states, equity doctrines, so far as concerns evidence, have been from the beginning accepted as part of the common law. I have therefore thought it proper to incorporate in my text the principles of equity evidence.

4. The old common law rules with regard to relevancy can no longer be maintained against the criticisms, first, of Mr. Bentham, then, of Mr. J. S. Mill, and more recently, of Mr. Fitzjames Stephen; nor, in fact, do we find these rules recognized, in the shape in which they were formerly put, in our later authoritative adjudications. Relevancy, it is now felt, is to be determined by the laws, not of formal jurisprudence, but of free logic; and in obedience to this conviction, we have a series of recent rulings based on logical, as distinguished from technically juridical grounds. These decisions I have endeavored to systematize, discussing, at the same time, the leading theories by which they may be harmonized.

5. To presumptions, as will hereafter be seen more fully,² the observations just made apply with increased force. Of the old presumptions *juris et de jure*, scarcely a representative remains; presumptions of law, in the technical sense, retain a permanent existence, but with ranks greatly diminished. Presumptive proof, taking it in its general sense, is now, such is the

¹ Lord Coleridge, C. J., cited London Law Times, Feb. 3, 1877, p. 235.

² *Infra*, §§ 1234-1236.

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tendency of our adjudications, inductive, not deductive ; and is regulated, therefore, not by tests applied generically, before the evidence is opened, but by tests applied specifically, after the evidence is closed.¹ To illustrate this tendency requires a readjustment, which I have attempted, of the whole law in this relation ; so that our authorities can be considered in their logical, as well as in their technical juridical relations:

Two other observations I must be permitted to make. The first is, that while, by the addition of a third volume, the present commentary could have been extended so as to include a treatise on evidence in criminal issues, it seemed to me better to retain the latter topic in my work on Criminal Law. In civil trials there is rarely occasion to cite a ruling on criminal evidence ; in criminal trials, it is a convenience for the practitioner to have by him, in an entire work, whatever appertains to the issue with which he is concerned. The second observation I would add is in the nature of an apology — not for the first time made by me — for the apparent redundancy of my citations of authorities. If this be excepted to, I might reply that it would have been far easier to have cited only leading cases from what might be called leading states. This course I once pursued ; but the changes that have occurred since I published my first law book have admonished me that neither leading cases nor leading states can be relied on as permanently retaining their rank. Several American States which, twenty years ago, had only territorial courts, now take a justly authoritative standing in our jurisprudence ; and many decisions which, twenty years ago, were leading, have now been overruled, or have become obsolete. I have therefore, on each point, cited, as far as I could collect them, the rulings, no matter how obscure, of each of our American States, no matter how recent its establishment. One other reason for this course I may add. To a thorough student, the

¹ See *infra*, § 1237 *et seq.*

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text is as much explained by the citations, as are the citations by the text. "A. v. B.," "C. v. D.," "E. v. F.," at the first sight appear dead formulas. They are, however, living signs, giving us the means of inquiring how the doctrine of the text works in real life, to what limitation it is subject, of what elasticity it is capable. They not only dramatize the subject, but, as no two cases are alike, and each new case brings up a new application, they open a series of refined distinctions which, while necessary to the practitioner for their authoritativeness, may be resorted to by the student, as affording, in connection with the maxims which they illustrate, the only mode of fully mastering the science of jurisprudence. With peculiar force does this observation apply to a country in which, as in our own, each state not only has a distinctive population, but has received, either by tradition or by code, a jurisprudence in some respects peculiar to itself.

F. W.

March 7, 1877.

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ERRATA.



VOLUME I.

Page 16. Line 16, for "reecordo" read "ricordo."

31. 3d line, for "either" read "any."

36. 1st line, for "either" read "any."

110. 5th line, for "were" read "was."

126. 2d line, for "can only" read "cannot."

130. 5th line, dele "§ 115."

194. 10th line from bottom, for "have" read "has."

211. 3d line from bottom, for "declaration" read "declarations."

328. 9th line from top, change " ; " for " , ".

332. 7th line, for "*probatantur*" read "*probantur*."

376. 9th line, for "is" read "are."

444. Note, parag. 3d, add "The above statute was repealed by the act of 1870, ch. 393, *quod vide*."

507. 8th line from bottom, for "are" read "is."

525. In the place of "contradict," in line 2, insert "to prove a case inconsistent with that stated by".

550. 4th line, for "reëxamine his witnesses" read "thus remould his case."

VOLUME II.

Page 40. 3d line, § 798, after "cannot" insert " , if he be negligent in this respect,".

43. End of note 4, add "that a foreign judgment may be impeached when manifestly erroneous by the *lex fori*, see *Meyer v. Ralli*, L. R. 1 C. P. D. 359."

48. End of first note, add, "That non-service of writ may not be fatal where the defendant impliedly waives service, see *Copin v. Alexander*, L. R. 1 Ex. D. 85; aff. Ct. of Appeals, *S. C.* 24 W. R. 85."

62. End of note 1, add, "As to limits of judgments *in rem*, see *Meyer v. Ralli*, L. R. 1 C. P. D. 359."

87. 1st column, 10th line from bottom, for "§ 867" read "§ 868."

115. Marginal note, for "takes" read "take."

149. Note 5, for "Hatcher" read "Hedges."

188. Last note, for "Fenton" read "Denton."

199. Last note, for "Petburgh" read "Retburgh."

256. To note 8 add, "As to parol proof of non-delivery, or non-execution of contracts, see *supra*, §§ 926-935."

373. Last line, strike out "ordinarily."

405. Line 4, for "admission" read "admissions."

419. In marginal note, for "admission" read "admissions."

443. Line 10, for "*praesumptionis*" read "*praesumptiones*."

456. 5th line from bottom, for "guilty" read "innocent."

462. 8th line from bottom, for "no" read "not."

462. In last lines, for "*praesumptio*" read "*praesumptio*."

498. Line 3, before "father" insert "alleged."

506. Note 4, for "Closmedene" read "Closmadene."

BOOK I.

REQUISITES OF PROOF.

CHAPTER I.

PRELIMINARY CONSIDERATIONS.

Proof is the sufficient reason for a proposition, § 1.	Analogy is the true logical process in juridical proof, § 6.
Formal proof to be distinguished from real, § 2.	Proof to be distinguished from demonstration, § 7.
Evidence is proof admitted on trial, § 3.	Fallacy of distinction between direct and circumstantial evidence, § 8.
Object of evidence is juridical conviction, § 4.	Juridical value of hypothesis, § 12.
Formal proof should be expressive of real, § 5.	Facts cannot be detached from opinion, § 15.

1. *Nature of Proof.*

§ 1. PROOF is logically defined as the sufficient reason (*ratio sufficiens*) for assenting to a proposition as true. A proposition is a statement which does not contain in itself sufficient proof of its truth. Proof, in civil process, is a sufficient reason for the truth of a juridical proposition by which a party seeks either to maintain his own claim or to defeat the claim of another.

Proof is the sufficient reason for a proposition.

§ 2. The truth on which a juridical proposition depends is styled *formal* as distinguished from *real*. It is true, that the object of all sound jurisprudence is to render formal truth as far as possible the reflex of real. But this result can be only approximately reached. Apart from the general consideration that no witness can detail with perfect accuracy that which he has seen, and that (from the inadequacy

Formal truth to be distinguished from real.

of language), no written instrument can be framed which can exclude all doubt as to the intention of the parties, cases must frequently arise in which an adjudicating tribunal is compelled to give a formal decision which conflicts with a moral conviction. A statute, for instance, prescribes that when, in a criminal trial, a defendant declines to be sworn on his own behalf as a witness, this shall not be regarded as a presumption against him. A case may be of such a character that, were such a statute not in force, the refusal by the defendant to avail himself of a means of explanation which the law gives him, would turn the scales against him. But the statute forbids the application of such a presumption; and the case has to be decided precisely as if the defendant had no opportunity of giving exculpatory testimony. So a confession by the defendant, made to counsel, may reach the court and jury; and such testimony may be even received as evidence, and may be morally conclusive as to the defendant's guilt; but should the court, convinced of the error of receiving the testimony, direct it to be stricken out, the case must be decided as if the testimony had never been rendered.

§ 3. So far as concerns the use to be made of the terms in the present treatise, "proof" has a far wider meaning than "evidence." Evidence includes the reproduction, before the determining tribunal, of the admissions of parties, and of facts relevant to the issue. Proof, in addition, includes presumptions either of law or fact, and citations of law.¹ Proof, in this sense, comprehends all the grounds on which rests assent to the truth of a specific proposition. Evidence, in this view, is adduced only by the parties, through witnesses, documents, or inspection; proof may be adduced by counsel in argument, or by the judge in summing up a case. The distinction is constantly noticed in the Roman standards; though both senses are assigned to the word *probare*. Occasionally, indeed, we find *implere* used as convertible with *probare*, in the sense of putting in evidence. (See L. 19; L. 23, D. de prob.) As other equivalent expressions may be noticed, *ostendere*, *adprobare*, *fidem facere rei alicuius*, *monstare*.² In the Roman jurists, in fact, we may find three distinct meanings of the word "proof;"

¹ See *Harvey v. Smith*, 17 Ind. 272.

² Weber, Heffter's ed. 4; Brisson, de V. S. vv.

each of which meanings is recognized in our own jurisprudence. *First*, Proof may be used in the wide sense, just noticed, of the reasons or grounds on which a particular proposition may be maintained. Thus counsel may say, "This point you may consider as fully proved;" and hence, also, the common division of proofs into complete and incomplete.¹ In this sense, also, we speak of invalid proofs, *falsis probationibus*; and of proofs tending to a particular conclusion, *probationes ad fidem faciendam idoneae*; though the proofs in each case may be weak or strong, logical or illogical, true or false. *Secondly*. In a more narrow and arbitrary sense, Proof may be used as convertible with Conviction, and as producing conclusions as to which there can be no doubt. *Thirdly*. Proof may be received in its formal and juridical sense, as the instrument which tends to lead the minds of judge or jury to a particular conclusion. Proof in this sense is to be regarded not as an instrument to produce mathematical or even moral certainty,—not as a means of convincing the opposing party,—not even as a means of working a moral conviction in the minds of judge or of jury; but as a means of bringing them to such an official or juridical conviction as will require from them a particular legal action.

¹ Mr. Fitzjames Stephen, in the "Definition of Terms," which is the introduction to his Digest of Evidence, tells us that "Evidence means (1.) All statements which the judge permits or requires to be made by witnesses in court, in relation to matters of fact under inquiry;

"Such statements are called oral evidence:

"(2.) All documents produced for the inspection of the court or judge;

"Such documents are called documentary evidence."

To this definition a critic in the Solicitor's Journal for September 2, 1876, objects that it excludes not only affidavits, on which cases are frequently tried, but depositions. The qualification, "which the judge permits or suffers to be read," is also ex-

cepted to not only as involving a contradiction, but as making the judge's decision the final test of evidence, when, in practice, judges may, and actually do, decide wrong. The following definition is proposed as a substitute for Mr. Stephen's, so far as concerns evidence not documentary: "Evidence means (1.) Statements made by witnesses before the court in relation to matters of fact under inquiry; such statements are called oral evidence. (2.) Statements made by witnesses in relation to matters of fact under inquiry before persons authorized by law to take affidavits, affirmations, and depositions to be used, or which may be used, on the hearing of such matters by the court; such statements are called evidence on deposition."

In this sense, the only one in which we have here to consider the term Proof, the distinction between Proof and Evidence becomes the more clear. Evidence is a part, and only a small part of Proof. It is part of the material on which Proof acts ; it is not reason, but a part of the basis of reason. It is therefore such juridical admissions, and such reproduction of relevant facts, as, under due check of law, may be received on the trial of a litigated issue.

§ 4. Hence it is important at the outset to lay firm hold of the principle that what is required in the trial of an issue is juridical (*veritas juridica, forensis*), as distinguished from moral truth. The dangers which would flow from an obliteration of this distinction are obvious. I may have, for instance, as a judge, a moral conviction of the guilt of a defendant on trial. He may have confessed his guilt to me in a way which leaves no doubt as to his sincerity ; or I may have learned from persons not called as witnesses facts which make his complicity unquestionable. This, however, is not to be permitted to have the slightest effect on my juridical reasoning ; for, even though the man be really guilty, to punish him without juridical certainty of his guilt would be recognizing a principle fatal to public justice. Let it once be admitted that moral conclusions as to a case are to be substituted for juridical, and then, in the breasts of judges as well as of juries, prejudices, destructive of all social stability, will determine the results of litigation. The plaintiff is a bad man, and the money, if he recovers it, would be badly spent ; or he belongs to a political or religious party which it is important to suppress ; or he has acted fraudulently or oppressively in so many other matters that it may be inferred that he acted fraudulently or oppressively in those under investigation ; and hence he should not succeed. Or the defendant is a rich man, and will not feel the loss if a judgment be entered against him ; or he belongs to a dangerous class ; or his antecedents, though those are not in evidence against him, make it probable that he is in the wrong ; and hence he should lose the suit. If side considerations, such as these, are to be received to affect the judgment of court or jury, then such considerations would be multiplied indefinitely, and there would be no case tried in which some prejudice, popular or personal, on

the part of the adjudicating tribunal, would not be seized upon as a pretext on which the result would be made to hang. Hence it is that all civilized jurisprudences have imposed with peculiar solemnity rules to distinguish between juridical and moral evidence; and have bound judges and jurors by oath to decide cases solely on juridical grounds. Even in respect to Proof, using the term Proof in its wide sense as distinguished from Evidence, the office of the judge has been for the same reason closely defined. In reasoning upon evidence, it is true, he is entitled to fall back on the ordinary course of events, and to reach, from facts put in evidence, inductive conclusions, based on the common experience of nature and of society. Under this head fall the conclusions from circumstantial evidence; *probatio artificialis*. Certain, indeed, of these conclusions are so compulsory as to approach mathematical certainty. A man, for instance, cannot be in two places at exactly the same moment of time; and a judge has a right to say, that assuming it to be true (which, however, is a point dependent upon the accuracy and honesty of witnesses), that A., at a particular moment, was in the city of B., he could not, at the same moment, have been in the city of C. *A fortiori* is this the case with natural laws. Where no conclusive law of this class can be invoked, the law, in certain specified cases, establishes, for the purpose of limiting the range of judicial decision, certain presumptions, which the judge is bound to accept, either as irrebuttable (*e. g.* that all subjects know the laws of their own country, and that an infant under seven is not *capax doli*), or as rebuttable (*e. g.* that of regularity in business transactions, *naturalia negotii*; that of innocence in parties accused, and that of sanity among persons arrived at years of discretion). In all matters of reasoning which are not so limited, the determining tribunal is at liberty, as hereafter will be more fully seen, to draw from the evidence in the case such conclusions of fact as are consistent with sound logic. But no evidence (guarding the term by the limitations hereafter more fully expressed)¹ which is not admitted on the trial is to be permitted by that tribunal to influence its conclusions.

§ 5. That there is absolute truth, as to all controverted issues, is conceded in jurisprudence, as in all other moral sci-

¹ See *infra*, § 276 *et seq.*

ences. It is at the same time conceded that such truth can be reached by us, from the limitation of our faculties, not objectively, as it really exists, but subjectively, as it may be made to appear to ourselves. In what way we can arrive at the most accurate conception of such truth is the object of the science of jurisprudence. Certain processes, *e. g.* those dependent upon logic, and on a *priori* conceptions, it uses in common with all other sciences. So far, however, as concerns the proof of facts on which its judgments are to rest, it requires that such proof should be offered in subordination to certain established juridical rules. It is not enough that the adjudicating tribunal should be convinced of the truth of such facts; such conviction must be worked by legal evidence legally admitted on trial. Truth thus reached is styled *formal*, as distinguished from *real*. It must be remembered, however, that the term "formal" truth admits of several shades. It may, in its narrowest sense, be viewed as including only such truth as is actually proved by evidence offered in the case. In its widest sense, it includes not only such truth so proved, but all reasonable inferences from such truth; and it assumes, as part of such truth, without requiring proof of the same, such conclusions of experience and of physical and social science, as are within the ordinary knowledge of intelligent men of the time and place. It will be seen that formal truth, viewing it in this enlarged sense, approaches as nearly to real truth, as a sound policy will permit. If, dismissing the last relics of the old rules of special pleading, the parties are permitted to present issues which will embrace all of their respective cases; if they are permitted to introduce all evidence, not excluded by sound rules of policy, which is relevant to such issue; if the adjudicating tribunal is empowered, subject to such rules of policy, to determine the case on such evidence, by the aid of a free logic and of an enlightened acquaintance with the ordinary laws of sociology and physical science, then formal truth will coincide, so far as such coincidence is just and practical, with real truth. This end our Anglo-American legislation has for years been struggling to reach, seeking to throw off the restrictions of scholastic jurisprudence, — a jurisprudence which first by subtle rules of pleading, compelled much that is material to be excluded from the issue, and then, when the

issue was thus arbitrarily narrowed, shut out much evidence that was relevant, and attached to the evidence received certain arbitrary valuations which the courts were required to apply. These restrictions, so far as they involve mutilating of issues by special pleading, have been now virtually abrogated by the rules of most of our courts, and, so far as concerns the excluding of all witnesses interested in a case, they have recently, both in England and in the United States, been removed by statute. So far as concerns the arbitrary valuation assigned to evidence when received, the scholastic subtleties were, with a single exception, not accepted in England. The exception to which I refer is the assignment of various degrees of probative force to presumptions; producing thereby an artificial system of formal as distinguished from real truth. This system is now in some of its branches destroyed by statute; in others, as will hereafter be more fully shown, it is so modified by the courts as to leave of it little except a name. Supposing, as is assumed, the object of jurisprudence, which these changes have in view, is to make formal truth the expression of real, then it may now be well maintained that this object has been in a great measure achieved. But the work has been done by processes which leave a large part of our earlier text books without value, and which require the discussion of several important principles of which it was not necessary for those text books to treat. The discussion of these principles, in connection with others which contribute to constitute the law as it really is, it is the object of the present work to undertake.

§ 6. The true logical process, in juridical as well as in historical reasoning, is imperfect induction, or analogy.¹ “The inference of analogy is an inference from particulars or individuals to a coördinate particular or individual. Its scheme is the following:—

Analogy
the true
logical
process in
juridical
proof.

	M is P.
~	S is similar to M.
	<hr/> S is P.

Or more definitely, since it also gives that in which the similarity consists, the following:—

¹ See this lucidly explained in Ueberweg's *Logic*, Lindsay's translation, § 131.

M is P.

M is A.

S is A.

S is P.

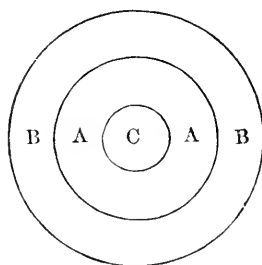
“In so far as the logical connection between S. and P. is uncertain in Imperfect Induction or Analogy, the conclusion has only a problematic validity. If the reasons for its existence are of more weight than the reasons against, the conclusion has probability (*probabilitas*). If an attempt be made to define more closely the different degrees intermediate between the complete certainty of the conclusion and the certainty of its contradictory opposite, the term probability is also used in a wider sense as the common name for the whole of these degrees. The degree of probability in this sense admits in certain cases of mathematical determination, which may have not only probability but also certainty. When different analogies, some of which point to the conclusion and the others to its contradictory opposite, are in general alike applicable, the degree of probability may be represented mathematically as a fraction, whose numerator is formed by the number of cases for, and its denominator by the number of cases compared. So far as the different analogies differ in the degree of the possibility of their finding application, a mathematical determination of the degree of probability is generally impossible. In this case a less exact valuation of the degree of probability may be arrived at, which can lay claim to probability only, not to certainty. This kind of valuation of the degree of probability is commonly called the philosophical in opposition to the mathematical, but more correctly the dynamic, in so far as it depends upon the relative consideration of the internal force of the causes for and against.”¹

§ 7. The fallacy which underlies the confusion of “demonstration” with “proof” may require a more technical exposition. “Demonstration” is a conclusion drawn from a uni-

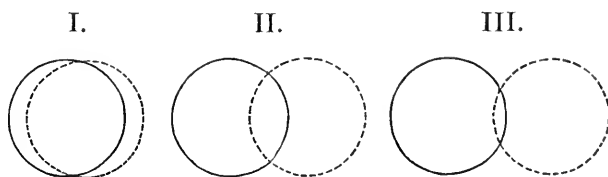
¹ Ueberweg's *System der Logik*, Formal Logic, or Calculus of Inference, Necessary and Probable, pp. 170-210; and Boole's *Laws of Thought*, pp. 243-399.

versal major premise, producing absolute certainty; “proof” is the conclusion drawn from a particular major premise, producing probable certainty. Thus we say all A is B; C is A, therefore C is B. Or, all islands are surrounded by water; C is an island, therefore C is surrounded by water. The formula is thus illustrated:—

“Proof”
to be distinguished
from
“demonstration.”



This is demonstration, and admits of no degrees of certainty, being necessarily true. On the other hand, “proof,” in the sense in which the term is here used, is a conclusion drawn from a particular major premise, and admits of various degrees of certainty, as will be illustrated by the following figures:—



Supposing A represents those of the above circles drawn in dots, and B those drawn in continuous lines, then the major premise, “some A is B,” will enable us only to support a probable conclusion as to C, unless we know in what part of A C happens to fall. In other words, we may say “some of the railroad investments made before the panic of 1872 have proved worthless; A. made certain investments in railroads prior to such panic; therefore there is a probability that some of these investments made by A. have proved worthless.” It is obvious that the conclusion is one admitting of various degrees of probability. Thus we may say “ $\frac{9}{10}$ of B is A; C is B; therefore it is 9 to 1 that C is

A.”¹ But in no case involving moral judgment are we able to exclude all possibility of the contrary; in other words, in no case involving moral judgment are we able to assert absolutely a universal affirmative or a universal negative.²

¹ See *Ingram v. Plasket*, 3 Blackf. 450; *Crabtree v. Reed*, 50 Ill. 206.

² “The phrase, ‘moral certainty,’ has been introduced into our jurisprudence from the publicists and metaphysicians, and signifies only a very high degree of probability. It was observed by Pufendorf, that ‘When we declare such a thing to be morally certain, because it has been confirmed by credible witnesses, this moral certitude is nothing else but a strong presumption grounded on probable reasons, and which very seldom fails and deceives us.’ *Law of Nature and Nations* (Eng. ed. 1749), book i. c. 2, § 11. ‘Probable evidence,’ says Bishop Butler, in the opening sentence of his *Analogy*, ‘is essentially distinguished from demonstrative by this, that it admits of degrees, and of all variety of them, from the highest moral certainty to the very lowest presumption.’

“Proof ‘beyond a reasonable doubt’ is not beyond all possible or imaginary doubt, but such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof ‘to a moral certainty,’ as distinguished from an absolute certainty. As applied to a judicial trial for crime, the two phrases are synonymous and equivalent; each has been used by eminent judges to explain the other; and each signifies such proof as satisfies the judgment and consciences of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible.”

Gray, C. J., Commonwealth v. Costley, 118 Mass. 21.

“Probable evidence is essentially distinguished from demonstrative by this, that it admits of degrees, and of all variety of them, from the highest moral certainty to the very lowest presumption. We cannot, indeed, say a thing is probably true upon one very slight presumption for it; because, as there may be probabilities on both sides of a question, there may be some against it; and though there be not, yet a slight presumption does not beget that degree of conviction which is implied in saying a thing is probably true. But that the slightest possible presumption is of the nature of a probability, appears from hence; that such low presumption, often repeated, will amount even to moral certainty. Thus a man’s having observed the ebb and flow of the tide to-day, affords some sort of presumption, though the lowest imaginable, that it may happen again to-morrow; but the observation of this event for so many days, and months, and ages together, as it has been observed by mankind, gives us a full assurance that it will.

“That which chiefly constitutes Probability is expressed in the word *Likely*; *i. e.* like some truth, or true event; like it, in itself, in its evidence, in some more or fewer of its circumstances. For when we determine a thing to be probably true, suppose that an event has or will come to pass, it is from the mind’s remarking in it a likeness to some other event which we have observed has come to pass. And this observation forms, in num-

§ 8. A distinction is frequently made between direct and circumstantial evidence, and it is intimated that to each there is a distinctive degree of probability to be assigned.¹ It is difficult, however, to see how what is called "circumstantial" or "indirect" evidence differs in kind from direct, however great may be the difference as to the

Fallacy of distinction between "direct" and "circumstantial" evidence.

berless daily instances, a presumption, opinion, or full conviction, that such event has or will come to pass; according as the observation is, that the like event has sometimes, most commonly or always, so far as our observation reaches, come to pass at like distances of time, or place, or upon like occasions. Hence arises the belief that a child, if it lives twenty years, will grow up to the stature and strength of a man; that food will contribute to the preservation of its life, and the want of it for such a number of days be its certain destruction. So likewise the rule and measure of our hopes and fears concerning the success of our pursuits; our expectations that others will act so and so in such circumstances; and our judgment that such actions proceed from such principles; all these rely upon our having observed the like to what we hope, fear, expect, judge; I say, upon our having observed the like either with respect to others or ourselves. And thus, whereas the prince who had always lived in a warm climate naturally concluded, in the way of analogy, that there was no such thing as water's becoming hard, because he had always observed it to be fluid and yielding; we, on the contrary, from analogy, conclude, that there is no presumption at all against this; that it is supposable there may be frost in England any given day in January next; probable that there will on

some day of the month; and that there is a moral certainty, *i. e.* ground for an expectation, without any doubt of it, in some part or other of the winter.

"Probable evidence, in its very nature, affords but an imperfect kind of information, and is to be considered as relative only to beings of limited capacities. For nothing which is the possible object of knowledge, whether past, present, or future, can be probable to an infinite intelligence; since it cannot but be discerned absolutely as it is in itself, certainly true, or certainly false. But to us probability is the very guide of life.

"From these things it follows, that in questions of difficulty, or such as are thought so, where more satisfactory evidence cannot be had, or is not seen; if the result of examination be, that there appears upon the whole, any the lowest presumption on one side, and none on the other, or a greater presumption on one side, though in the lowest degree greater; this determines the question, even in matters of speculation; and in matters of practice will lay us under an absolute and formal obligation, in point of prudence and of interest, to act upon that presumption or low probability, though it be so low as to leave the mind in very great doubt which is the truth. For surely a man is as really bound in prudence to do what upon the whole appears, according to the

¹ See Greenleaf's Ev. § 13 *et seq.*; Taylor's Ev. § 56 *et seq.*; Best's Ev. § 25. See, also, *infra*, § 509.

intensity of the proof afforded. There is no testimony that is direct, if we mean by direct an immediate presentation of a fact observed. Mathematical demonstration might be called direct; but mathematical demonstration is not evidence in the juridical sense. For juridical evidence is evidence of mutable phenomena through human agency addressed to a human tribunal; and both as

best of his judgment, to be for his happiness, as what he certainly knows to be so. Nay, further, in questions of great consequence, a reasonable man will think it concerns him to remark lower probabilities and presumptions than these; such as amount to no more than showing one side of a question to be as supposable and credible as the other; nay, such as but amount to much less even than this. For numberless instances might be mentioned respecting the common pursuits of life, where a man would be thought, in a literal sense, distracted, who would not act, and with great application too, not only upon an even chance, but upon much less, and where the probability or chance was greatly against his succeeding." Bishop Butler, *Introduction to Analogy*.

"Symbolical notation, then, being the perfection of the syllogistic method, it follows that, when words are substituted for symbols, it will be its aim to circumscribe and stint their import as much as possible, lest perchance A should not always exactly mean A, and B mean B; and to make them as much as possible the calculi of notions, which are in our absolute power, as meaning just what we choose them to mean, and as little as possible the tokens of real things, which are outside of us, and which mean we do not know how much, but so much certainly as may run away with us, in proportion as we enter into them, beyond the range of scientific management. The concrete matter of propositions is a constant source of trouble

to syllogistic reasoning, as marring the simplicity and perfection of its process. Words, which denote things, have innumerable implications, but in inferential exercises it is the very triumph of that clearness and hardness of head, which is the characteristic talent in the art, to have stripped them of all these connatural senses, to have drained them of that depth and breadth of associations which constitute their poetry, their rhetoric, and their historical life, to have starved each term down till it has become the ghost of itself, and everywhere one and the same ghost, 'omnibus umbra locis,' so that it may stand for just one unreal aspect of the concrete thing to which it properly belongs, for a relation, a generalization, or other abstraction, for a notion neatly turned out of the laboratory of the mind, and sufficiently tame and subdued because existing only in a definition.

"Thus it is that the logician for his own purposes, and most usefully as far as those purposes are concerned, turns rivers, full, winding, and beautiful, into navigable canals. To him dog or horse is not a thing which he sees, but a mere word suggesting ideas; and by dog or horse universal he means not the aggregate of all individual dogs or horses, brought together, but a common aspect, meagre but precise, of all existing or possible dogs or horses, which at the same time does not really correspond to any one dog or horse out of the whole aggregate. Such minute fidelity in the representation of individuals is neither

to the witnesses and the things to which they testify, credit is only given on probable grounds. This probability is both subjective,

necessary nor possible to his art; his business is not to ascertain facts in the concrete, but to find and to dress up middle terms; and, provided they and the extremes which they go between are not equivocal, either in themselves or in their use, supposing he can enable his pupils to show well in a *vivâ voce* disputation, or in a popular harangue, or in a written dissertation, he has achieved the main purpose of his profession.

"Such are the characteristics of reasoning, viewed as a science or scientific art, or inferential process, and we might anticipate that, narrow as by necessity is its field of view, for that reason its pretensions to be demonstrative were incontrovertible. In a certain sense they really are so; while we talk logic, we are unanswerable; but then, on the other hand, this universal living scene of things is after all as little a logical world as it is a poetical; and as it cannot without violence be exalted into poetical perfection, neither can it be attenuated into a logical formula. Abstract can only conduct to abstract; but we have need to attain by our reasonings to what is concrete; and the margin between the abstract conclusions of the science, and the concrete facts which we wish to ascertain, will be found to reduce the force of the inferential method from demonstration to the mere determination of the probable. Thus, since (as I have already said) inference starts with conditions, as starting with premises, here are two reasons why, when employed upon matters of fact, it can only conclude probabilities: first, because its premises are assumed, not proved; secondly, because its conclusions are abstract, and not concrete.

I will now consider these two points separately." Newman's *Grammar of Assent* (New York, 1870), 255 *et seq.*

"This is true of other inferences beside mathematical. They come to no definite conclusions about matters of facts, except as they are made effectual for their purpose by the living intelligence which uses them. 'All men have their price; Fabricius is a man; he has his price;' but he had not his price; how is this? Because he is more than a universal; because he falls under other universals; because universals are ever at war with each other; because what is called a universal is only a general; because what is only a general does not lead to a necessary conclusion. Let us judge him by another universal. 'Men have a conscience; Fabricius is a man; he has a conscience.' Until we have actual experience of Fabricius, we can only say, that since he is a man, perhaps he will take a bribe, and perhaps he will not. 'Latet dolus in generalibus;' they are arbitrary and fallacious, if we take them for more than broad views and aspects of things serving as our notes and indications for judging of the particular, but not absolutely touching and determining facts.

"Let units come first, and (so-called) universals second; let universals minister to units, not units be sacrificed to universals. John, Richard, and Robert are individual things, independent, incommunicable. We may find some kind of common measure between them, and we may give it the name of man, man as such, the typical man, the auto-anthropos. We are justified in so doing, and in investing it with general attributes, and bestowing on

as to the witness, and objective as to the thing testified to; in other words, in order to accept the truth of a statement of a wit-

it what we consider a definition. But we go on to impose our definition on the whole race, and to every member of it, to the thousand Johns, Richards, and Roberts who are found in it. Each of them is what he is, in spite of it. Not any one of them is man, as such, or coincides with the auto-anthropos. Another John is not necessarily rational, because 'all men are rational,' for he may be an idiot; nor because 'man is a being of progress,' does the second Richard progress, for he may be a dunce; nor because 'man is made for society,' must we go on to deny that the second Robert is a gipsy or a bandit, as he is found to be. There is no such thing as stereotyped humanity; it must ever be a vague, bodiless idea, because the concrete units from which it is formed are independent realities. General laws are not inviolable truths; much less are they necessary causes. Since, as a rule, men are rational, progressive, and social, there is a high probability of this rule being true in the case of a particular person; but we must know him to be sure of it." Ibid. 267.

"So, too, as regards Induction and Analogy, as modes of Inference; for, whether I argue, 'This place will have the cholera, unless it is drained; for there are a number of well-ascertained cases which point to this conclusion,' or, 'The sun will rise to-morrow, for it rose to-day;' in either method of reasoning I appeal, in order to prove a particular case, to a general principle or law, which has not force enough to warrant more than a probable conclusion. As to the cholera, the place in question may have certain antagonist advantages, which anticipate or neutralize the miasma

which is the recipient of the poison; and as to the sun's rising to-morrow, there was a first day of the sun's rising, and therefore there may be a last." Ibid. 271.

"It is plain that formal logical sequence is not in fact the method by which we are enabled to become certain of what is concrete; and it is equally plain, from what has been already suggested, what the real and necessary method is. It is the cumulation of probabilities, independent of each other, arising out of the nature and circumstances of the particular case which is under review; probabilities too fine to avail separately, too subtle and circuitous to be convertible into syllogisms, too numerous and various for such conversion, even were they convertible. As a man's portrait differs from a sketch of him, in having, not merely a continuous outline, but all its details filled in, and shades and colors laid on and harmonized together, such is the multiform and intricate process of ratiocination, necessary for our reaching him as a concrete fact, compared with the rude operation of syllogistic treatment." Ibid. 276.

"No matter of fact, that is to say, no actual phenomenon of external nature, can, in any possible state of human knowledge, be a matter of demonstration. And it is this principle that fixes the limits of demonstrative science, separating the results of the necessary laws of mind from those of the generalized phenomena of matter." Mansel on the Limits of Demonstrative Science, Letters, Lectures, &c., 1873, p. 98. See, also, for an able expansion of this principle, Bentham's *Rationale of Judicial Evidence*, book v. chap. xvi.

ness that he saw a particular thing, it must appear circumstantially probable not only that the witness is competent to observe and is likely in this respect to tell the truth, but that the thing testified is probable. We may illustrate the first of these points by Paley's famous argument for the truth of the testimony of the Apostles. He does not say, "All men speak the truth; Matthew was a man; therefore Matthew spoke the truth;" but in view of the intrinsic improbability of some of the facts to which the Apostles testified, he appealed to a complex web of circumstances to show that the Apostles, uniting as they did in the main facts of their story with only such circumstantial variety as is one of the incidents of true historical narration, were from their history and character to be regarded as credible. Nor among the circumstances upon which the probability of such testimony depends, must we omit to notice the way in which it is presented, which is one of its subjective features. Mr. Greenleaf, when discussing the credibility of the Apostles¹ has grouped, with a completeness that leaves little to be added, the main incidents of this circumstantiality, without which the statements of the Apostles, however direct, would not have been probable. "Every event which actually transpires," he argues, "has its appropriate relation and place in the vast complication of circumstances of which the affairs of men consist; it owes its origin to the events which have preceded it, is intimately connected with all others which occur at the same time and place, and often with those of remote regions, and in its turn gives birth to numberless others which succeed. In all this almost inconceivable contexture, and seeming discord, there is perfect harmony; and while the fact, which really happened, tallies exactly with every other contemporaneous incident, related to it in the remotest degree, it is not possible for the wit of man to invent a story, which, if closely compared with the actual occurrences of the same time and place, may not be shown to be false. Hence, it is, that a false witness will not willingly detail any circumstances, in which his testimony will be open to contradiction, nor multiply them where there is danger of his being detected by a comparison of them with other accounts, equally circumstantial. He will rather deal

on the Distinction between Improbability and Impossibility.

¹ Greenleaf's Test. of Evangelists, 38-41.

in general statements and broad assertions. And if he finds it necessary for his purpose to employ names and particular circumstances in his story, he will endeavor to invent such as shall be out of the reach of all opposing proof ; and will be the most forward and minute in details, where he knows that any danger of contradiction is least to be apprehended. Therefore it is, that variety and minuteness of detail are usually regarded as certain tests of sincerity, if the story, in the circumstances related, is of a nature capable of easy refutation if it were false. The difference in the detail of circumstances between artful or false witnesses and those who testify the truth, is worthy of especial observation. The former are often copious and often profuse in their statements, as far as these may have been previously fabricated, and in relation to the principal matter ; but beyond this all will be reserved and meagre, from the fear of detection. Every lawyer knows how lightly the evidence of a *non-mi-recordo* witness is esteemed. The testimony of false witnesses will not be uniform in its texture, but will be unequal, unnatural, and inconsistent. On the contrary, in the testimony of true witnesses there is a visible and striking naturalness of manner, and an unaffected readiness and copiousness in the detail of circumstances, as well in one part of the narrative as another, and evidently without the least regard either to the facility or difficulty of verification or detection. It is easier, therefore, to make out the proof of any fact, if proof it may be called, by suborning one or more false witnesses, to testify directly to the matter in question, than to procure an equal number to testify falsely to such collateral and separate circumstances as will, without greater danger of detection, lead to the same false result. The increased number of witnesses to circumstances, and the increased number of the circumstances themselves, all tend to increase the probability of detection if the witnesses are false, because thereby the points are multiplied in which their statements may be compared with each other, as well as with the truth itself, and in the same proportion is increased the danger of variance and inconsistency."

§ 9. Lady Tichborne's acknowledgment as her son of the claimant to the Tichborne estates, may be taken as another illustration of the qualifying effect of circumstances on credibility viewing the same subjectively. If any testimony is to be regarded as

direct, that of a mother as to a child's identity must be so considered; and we might, if we followed the old scholastic jurists, hold that among the most reasonable of their doctrines was that which declared that the recognition by a mother of a child was an irrebuttable presumption of the real existence of the relations. Yet Lord Chief Justice Cockburn's analysis of the influences acting on Lady Tichborne shows how unreliable, as a medium for the communication of fact, a mother, when testifying as to the identity of an alleged child, may become.¹

¹ "The time had certainly come for his going to Lady Tichborne at Paris, as he had been in England since the 25th of December. Lady Tichborne being anxiously waiting for him in Paris, it was not possible to delay his departure on his visit to her any longer, and on the 10th he starts, and arrives in the evening at Paris. Now he was accepted, as we know, by Lady Tichborne on his arrival, in an interview to which I shall call your attention presently. But it may be as well, before we come to their first meeting, just to consider the frame of mind in which Lady Tichborne was at the time she first saw him. A great deal, of course, has been made of her acknowledgment of him as her son; and one cannot quarrel with the counsel for the defendant in making that the head and front of his battle. Recognition by the mother would outweigh the omission of a host of witnesses to find, in the defendant, the real Roger. If you want to express the change in a person's appearance in the strongest possible form, you resort to the popular expression, 'He is so changed that his own mother would not know him again.' And you cannot estimate too highly the authority which a mother's decision in such a matter ought to carry with it. But, as I said the other day, there is no rule so absolute but that it may admit of an exception, and the question is whether we shall find

such an exception here. Now when I admit to the full the authority which a mother's recognition of a child ought to carry with it, let me say I am not to be misled by any idle declamation about a mother's instinct. It is not like the feeling that an animal has, and possibly the human animal may have, for its new-born child. When the instinct of a mother is thus spoken of, it means something which is independent of judgment; some impulse of nature stronger than human judgment or human reason; something which carries you irresistibly on to some particular thing. But if a child were entirely separated from its mother immediately upon, or very shortly after, its birth, and she did not see that child again, do you suppose if twenty years afterwards she met that child in a crowd she would be irresistibly moved by some internal impulse to throw her arms around the neck of the man or woman, whichever it might be, with all the feelings of a mother? Do you suppose if a child is removed from the mother or father, and brought up by the grandmother, or grandfather, or uncle, or aunt, in another country, that after years have passed the person who had the bringing up or training of the child would not be a much better judge of its identity than the father or mother to whom it owed its birth? The knowledge of identity on the part of a parent is the result not of any natural

§ 10. When we turn from the subjective to the objective side of testimony, we find additional reason for the position just

impulse, independent of observation and judgment, whereby a mother is better able to recognize her child than anybody else would be; it arises from continually seeing and watching the particular individual, from becoming familiarized by daily habit with everything that appertains to personal identity, — features, form, gestures, everything which constitutes the sum total of identity. It is from being familiarized with these more than anybody else can be that the father or mother are best able to speak to the identity of the child. If a son has lived much away from father or mother, if he has lived more with others than with them, it may be that others may have quite as much ability to judge of his identity as the father or mother would have, perhaps even more. We must not, therefore, allow ourselves to be carried away by declamatory commonplace about a mother's instinct, but must look to see how far we can trust to the mother's judgment. More especially if we find in the particular instance that there has been some such strong bias as that we cannot rely on the judgment of the parent, we must not allow the conviction which every other fact and circumstance in the case would naturally tend to engender in our minds to be overruled and overwhelmed by the fact of a mother having said that a particular individual from whom she had been parted a great many years was her son. We should listen with all due respect to the opinion of the mother; we should take it as a circumstance calculated to weigh strongly in the one scale; but if our conviction, having taken into account the large range and variety of facts which we know and which the mother did not know, is that she must be

wrong, no appeal that is made to your feelings, or addressed to you in the name of the departed mother, ought to influence your judgments. Take it as a most important circumstance in the case, but not as conclusive, as the learned counsel would make it. If it were so, what need of all this long and protracted inquiry.

“Gentlemen, — Let us now consider whether there were not several things which ought to have made Lady Tichborne hesitate in accepting the defendant as her son, even if the defendant, on his appearance, had presented the outward and external appearance of the son whom she had lost? Were there not circumstances which ought to have made her pause and hesitate, and certainly not decide, before she had an opportunity of asking, in the words of the Patriarch, ‘Art thou my very son?’ Instead of which, long before she had seen him, and with all these difficulties standing in her way, she declares that he is her son, and accepts him as such. Just let us see what the circumstances were. There were, as she had learned from the correspondence of Mr. Gibbes, various things which the defendant had stated which were perfectly incompatible with the memory of Roger. She had been told that he had said he had had St. Vitus's dance. She knew perfectly well that Roger never had had it. She knew that he had denied that he had ever been educated at Stonyhurst; she knew that he had denied that he had been an officer in the Carabineers; she knew that he had said, in positive contradiction of her statement that he had been so, that he had enlisted as a private in some other regiment, — a regiment which had no existence. She knew he had referred to his grand-

stated. Is there such a thing, we may first inquire, as an object without circumstances? A witness, for instance, to take the ordinary illustration, says, "I saw A. murder B." But without details, showing in what the murder consisted, this statement is not evidence, and if offered, would be rejected by the court, as constituting, not evidence of a fact, but a conclusion of law. To make a statement of such a killing admissible, the witness must detail the circumstances, and from these circumstances the jury must infer whether or no murder was committed.¹

§ 11. But independently of this general view, there is no such constancy in things human as to enable a conclusion from past conditions to be other than probable. Whether Roger Tichborne, for instance, had tattoo marks on his left arm was a question as to which two distinct groups of witnesses, each of whom had opportunities of noticing his arm, were in express contradiction ;

father, whereas he never could have known his grandfather. Surely those were things which ought to have made her pause before she accepted him as her son, not having, up to that time, seen her. As to these things, you know there can be no doubt that he had made statements inconsistent with the facts, irreconcilable with the recollection of Roger. Furthermore, there were two things he had spontaneously referred to as proof to her of his identity ; he had referred to the brown mark, and the Brighton card case. Now, with regard to the first she knew perfectly well that she had never known, or seen, or heard of a brown mark. She says so in distinct terms. He might have such a mark, but she had never known it ; and inasmuch as it is in the highest degree improbable that a child would have a brown mark, such as the defendant is described to have, without the mother knowing of such a thing, either by ocular sight or by the nurse or nurses telling her, ought not that in itself to have created very considerable doubt in the mind of Lady Tichborne ? The brown mark,

however, belongs to a different head of our inquiry. I do not now stop to inquire whether he had a brown mark or not. For our present purpose it is enough that having been referred to by him as a proof of his identity, it was a thing altogether unknown to her." Cockburn. C. J., charge in Tichborne case, I. 611.

¹ I have discussed elsewhere (Wharton's Criminal Law, 7th ed. § 741), the question whether, even supposing the evidence be simply that of A. testifying that he saw B. shoot C., and C. fall down dead, we have what is, called direct testimony ; and the result of the argument I there submitted is, that even in such cases the evidence is circumstantial ; in other words, that in such cases we are convinced of guilt by inferring fact from fact. That even supposing we ourselves were the witnesses, our conclusions would be inferential, is exhibited with singular acuteness by Berkeley, in his *Theory of Vision*. See, on this topic, the remarks of Professor Frazer, in his late valuable and interesting *Life of Berkeley* (Oxford, 1871, p. 392).

and whether twelve years would efface such marks, whether they could be effaced by any artificial process, were points as to which there was equal conflict of testimony. So as to blood-stains Positive as are the assertions of scientific witnesses on each side of the question whether dried blood-stains can be determined to be human, it is agreed that no conclusion on this issue has been as yet reached sufficient to sustain the verdict of a jury; and it is also agreed that lapse of time gradually effaces in such blood stains whatever *differentia* they may at first be supposed to possess. So eminently is it the case with the human features. The Tichborne trial, to which we may again refer, shows that as to questions of identity, after the lapse of twelve years, what is called "direct" testimony, — *i. e.* the testimony of A. that he had seen B. and C., and that they are one and the same person, — is inferior in weight to what is called "circumstantial," *i. e.* facts connected with B. and C. capable of supporting inferences as to such identity. In fine, if we should follow in this respect the Tichborne case, we might hold that "direct" evidence is only circumstantial evidence in a secondary state. Mr. Hopkins, for instance, the family solicitor, holds the claimant to be Roger Tichborne, but on what, Chief Justice Cockburn well asks, does Mr. Hopkins base his opinion? On similarity of appearance? This is in any view no infallible test; and after the lapse of a few years, owing to the treachery of memory and the changes of the human countenance and form, ceases to be entitled to much confidence. On the habits of the claimant; on facts the witness undertakes to remember with which Roger Tichborne was peculiarly familiar? These, however, are conclusions as to which it is the peculiar province of the jury to determine. The only question is whether they are to take such facts at first hand or second hand; at first hand, as the independent materials for their own judgment; or at second hand, as the materials from which Mr. Hopkins formed his judgment, colored, as they must necessarily have been, as he detailed them, by his attitude in the case. But even this distinction, plausible as it is, is illusory. The evidence of a witness to identification, under such circumstances, is, if it be of any value, as circumstantial, as is the evidence of witnesses who never saw the party whose status is to be established, but who testify as to his handwriting, or any other conditions pe-

culiar to him. Mr. Hopkins' opinion, for instance, should he be called, is only valuable so far as it is sustainable by facts. In truth, should he appear to have had a bias in the matter, the efficiency of the facts, as transmitted by him is impaired by his opinion. If he were a mere passive, opinionless transmitter of the facts, they would be of greater value than they would be if his prejudices tempt him to view them either in one or the other light. We may take, as another illustration, the opinions as to the size of feet and hands, as given in the same remarkable trial. This opinion varied, so far as concerns Roger Tichborne, with the views of the witnesses as to the identity of the claimant with Roger. Opinions of such witnesses as to the size of Roger's feet, therefore, would be of very little value. Of great value, however, would be the shoemaker's last, giving the size of Roger's shoes; and of still greater value would be one of such shoes, as worn by Roger. Yet even here comes in the qualifying element arising from the infirmity of the subjective side of human evidence. The shoe itself could not, if it were carefully preserved, tell a falsehood; but a falsehood could be told, either intentionally or unintentionally, by the witnesses undertaking to identify it. Here, then, do we reach the true distinction on which to classify evidence in this relation. That which is mutable is a ground for a conclusion which rises in probability in inverse proportion to such mutability. The opinions of witnesses are mutable; the appearance of men is mutable; instruments of evidence (*e. g.* scraps of writing, parchment deeds, inscriptions on stone) are more or less mutable; even the face of nature is mutable, sometimes by convulsions through its own forces, sometimes by the hand of man. The *laws* of nature, indeed (*e. g.* the recurrence of sunrising and sunsetting at fixed periods), we assume, for the purposes of justice, to be immutable; and so, also, certain other facts are assumed, under the title of "fictions of law," as essential to a sound juridical policy. Other *primâ facie* presumptions we assume, under the title of presumptions of law, for the purpose of determining the burden of proof. But the scholastic distinction between "direct" and "circumstantial" evidence, with the consequent maxim that "direct" evidence has a greater probative force than "circumstantial," is based on a false analysis, and tends, in its operation, to the perversion of justice. No such

artificial test is philosophically possible ; to attempt to apply it is to resuscitate the absurdity of the scholastic distinction between whole-proof and half-proof, and to cause juries to find false verdicts under the lash of false law. The true test is, that all the evidence admitted in a case is to be weighed in the scales of natural logic. In other words, each piece of evidence, when in, is to have the weight attached to it by sound reason, unfettered by artificial rules.¹

¹ See *The Slavers*, 2 Wallace, 383 ; *U. S. v. Martin*, 2 McLean, 256 ; *U. S. v. Cole*, 5 McLean, 513 ; *U. S. v. Douglass*, 2 Blatch. 207 ; *Findley v. State*, 5 Blackf. 576 ; *Sumner v. State*, 5 Blackf. 579 ; *McGregor v. State*, 16 Ind. 9 ; *McCann v. State*, 21 Missis. 471 ; *Simpson v. Barnard*, 5 Fla. 528.

Mr. Elley Finch, in a note to an essay *On the Pursuit of Truth* (London, 1873), p. 26, cites the following from Professor Amos :—

“From whatever cause, the fact in question cannot be itself approached; but the surrounding facts, past, contemporaneous, or succeeding, may have been seen, heard, or felt, either by the investigator, or by somebody else, more or less likely to speak the truth about them. ‘Circumstantial evidence’ is, then, the sort of evidence to a fact taking place which is supplied, not by anybody’s having observed it take place, but by a number of other facts or circumstances having been observed which are held to furnish a legitimate ground for an inference from them to the fact in question.” *A Systematic View of the Science of Jurisprudence*, by Sheldon Amos, p. 333.

To this is added the following from Mr. Wills :—

“The distinct and specific proving power of circumstantial evidence depends upon its incompatibility with, and incapability of explanation upon, any reasonable hypothesis, other than

that of the truth of the principal fact in proof of which it is adduced. . . . Circumstantial evidence is inherently of a different and inferior nature from direct and positive testimony ; but, nevertheless, such evidence is most frequently superior in proving power to the average strength of direct evidence.” *Wills on Circumstantial Evidence*, pp. 274, 313.

On these passages Mr. Finch thus comments :—

“I cannot concur with Professor Amos in considering it a fallacy that circumstantial evidence may be intrinsically and essentially of far higher positive value than direct evidence. It is, I conceive, sometimes of higher value, that is, more conclusive and convincing, for the reason he gives, viz. : ‘The admitted truth, that among a large number of witnesses to isolated facts, of which facts the witnesses cannot appreciate the relevancy and import, there is less likelihood (or possibility, even) of conspiracy and perjury than where a small number of witnesses come prepared to tell an identical story about a limited number of direct facts obviously of the highest importance.’ *Ubi supra*. Every practical lawyer’s experience will, I venture to think, confirm this. Where such surrounding facts are so compacted and adapted, each to the other, like the parts of an arch or a dome, as to mutually sustain each other and form a coherent whole, they

§ 12. Such being the character of "proof," we are led to consider the value of hypothesis as a test for the discovery of evidential truth. We have before us, in every juridical inquiry, a collection of facts beneath which the truth lies. Some of these facts are irrelevant; others are forged either unintentionally or intentionally. The case is to be winnowed from this refuse material, and the true import of what remains is to be discovered. A leading physicist, Professor Tyndall, in his *Discourse on the Scientific Use of the Imagination*,¹ has shown how valuable is hypothesis in the extraction of scientific truth. It is of no less value in the extraction of juridical truth.²

Juridical
value of
hypothesis.

result in what Dr. Whewell terms the 'Consilience of Inductions.' *Philosophy of the Inductive Sciences*, vol. ii. p. 65. In direct evidence 'the facts to which the witnesses testify are, as a rule, facts in which they are more or less interested, and which, in many cases, excite their strongest passions to the highest degree. . . . They know what the point at issue is, and how their evidence bears upon it, so that they can shape it according to the effect which they wish to produce. . . . And the facts which they have to observe, being in most instances portions of human conduct, are so intricate, that even with the best intentions on the part of the witness to speak the truth, he will generally be inaccurate, and almost always incomplete in his account of what occurred.' *The Indian Evidence Act*, with an Introduction on the Principles of Judicial Evidence, by James Fitzjames Stephen, Q. C., chap. ii. A Statement of the Principles of Induction and Deduction, and a Comparison of their Application to Scientific and Judicial Inquiries, p. 29."

¹ London, 1870. See, particularly, observations on pp. 16, 17.

² "Hypothesis," to quote from another eminent thinker, "is the preliminary admission of an uncertain pre-

mise, which states what is held to be a cause, in order to test it by its consequences. Every single consequence which has no material truth, and has been derived with formal correctness, proves the falsehood of the hypothesis. Every consequence which has material truth does not prove the truth of the hypothesis, but vindicates for it a growing probability, which, in cases of corroboration, without exception, approaches to a position where the difference from complete certainty vanishes (like the hyperbola of the Asymptotes). The hypothesis is the more improbable in proportion as it must be propped up by artificial auxiliary hypothesis (*hypotheses subsidariæ*). It gains in probability by simplicity, and harmony or (partial) identity with other probable or certain presuppositions (*Simplex veri sigillum; causæ præter necessitatem non sunt multiplicandæ*)." Ueberweg's *Logic* (Lindsay's translation). § 134.

"Whenever a problem is under consideration, such as the Darwinian Origin of Species, the Wollfian hypothesis of the origin of the Homeric poems, Schleiermacher's, K. F. Hermann's, Munk's, &c., theory of the arrangement of the Platonic Dialogues, the various theories of the genesis of the Gospels, &c., the most

§ 13. Resorting again to the Tichborne case for illustrations, we may observe that the arguments for and against the claimant

essential condition for carrying on the investigation in a genuinely scientific, and, at the same time, the right and proper way for man, lies in this, — Let all the opposing fundamental opinions be brought under the view of different thoroughly testing hypotheses, and do not let the one opinion (as too often happens if it is the traditional one) be treated from outset as correct, necessary, sound, and rational, and those of opponents considered to be false, arbitrary, unsuitable, or foolish. In scientific investigation every belief which passes beyond the bounds of the scientific probability to be established is necessarily accompanied by illiberality, injustice, and passion, in proportion to the tenacity with which it is maintained; and this tenacity may arise from supposed ethical considerations, as happened to Kant to some extent.

“In every comprehensive problem of this kind, a great number of single circumstances must necessarily be explained. Now the student, whatever stand-point he may take, very seldom reaches the unusually favorable position where he is able to found a proof of the certainty, or even of the superior probability, of his view, and of the untenable nature of all opposing opinions upon any one of these circumstances which are to be considered. The conviction of the certainty or superior probability of an opinion may be scientifically established by a few instances, or even by a single instance, as in the case of Bacon’s *Experimentum Crucis*. In all other instances the possibility only, or the tenableness of an opinion, is the subject of investigation, and the removal of objections which seem to prove that opinion to be untenable. In this

investigation it is not only legitimate but advisable to place one’s self at the point of view of a given opinion, in order to construct a suitable, complete, and harmonious theory which may embrace all the facts of the case without distortion, by gathering together admissible conjectures. Two fallacies are easily fallen into. The one is, that he who argues in one way may perceive a proof for his opinion in the harmony established in this way, although this harmony may entirely differ from the thought itself, since, so long as this opinion is not absolutely confirmed by the arguments in its favor, the possibility of its being contradicted is always open. The other fallacy, which, as frequently occurs, is that when an opponent, from his stand-point, according to its internal consequences, frames his opinion, and keeps himself free from any confusion between arguments for the possibility, and arguments for the necessity of his view, he is, nevertheless, without purely or completely acquiescing in his stand-point, argued against as if the necessity of his opinion were the matter of investigation in every instance. What is uncertain, too, in his statements, which he requires in order to thoroughly carry out his fundamental view of the matter, is made matter of reproach against him. His presuppositions are treated as if they were a mere play of conjecture and evasion, an inadmissible departure from the ground of the fact, a creation of hypotheses from hypotheses, reasoning in a circle, or, at least, a capricious acceptance of what is unproved and of what should not be made use of without proof. But the fact of the matter is, that he who so speaks has to prove the impossibility

consisted, first, in the attempts on the one side or the other, to relieve the case of that which the party attempting the task

of his opponent's statements, not that they are not confirmed by facts, but that they are quite incompatible with facts, or with propositions which undeniably follow from the presuppositions of one's opponent, understood as he understands them; because, when possibility is denied, it is not enough to show the uncertainty, nor to prove the certainty of other cases, impossibility must be demonstrated. In cases of this kind it is one of the hardest of scientific and ethical problems to give fair play to one's opponent. Our own prejudices are sure to influence us. Yet the effect of the influence of another's stand-point, when it is reached, is of immense value in scientific knowledge. Polemic easily leads to exasperation; it is easy both to abuse it, and to let it alone, because of dislike to the conflicts which it produces; but it is difficult to recognize it, and use it in the right sense as the necessary form which the labor of investigation always takes. Man never attains to a scientific knowledge of the truth without a rightly conducted battle of scientifically justifiable hypotheses, the one against the other; the scientific guidance of this battle is the true dialectic method. . . .

"Every historical assertion, and assertions concerning the truth of reported occurrences, are hypotheses which must be confirmed in this way, that they alone fully explain the actual shape which the report took, and the further course of the historical occurrence; and that they fully coincide with what was to be expected, as the consequence of nature, of the circumstances, and of earlier occurrences. That the 'Koresch' who permitted the Jews to return from their exile, and to rebuild the

temple, was King Cyrus (Kosra), although this has been asserted by Josephus, and is to be accepted on the ground of tradition, must be held to be a mere hypothesis, so long as reasons worthy of notice are brought against the opinion; for the testimony of Josephus may be explained by the very probable psychological, though unhistorical, identification of a less known person with one better known, and from the interest Josephus had in making the well-known great king appear to be a friend of the Jews. The identification of 'Koresch' with Kuresch, a Babylonian satrap of Artaxerxes Longimanus, of his successor Darius, with Darius Nothus, the son of Xerxes and Esther, and consequently of Nebuchadnezzar, with Cambyses, is an hypothesis equally justifiable, which, if only it explains the facts, is worthy of the rank of an historical truth.

"In criminal cases the two assertions — on the one side of the guilt, on the other side of the innocence of the person accused — are to be recognized as hypotheses. The prosecutor and the defendant have to develop each hypothesis into its consequences, and to prove in how far their own hypothesis agrees with the facts obtained by observation and testimony, and how far their opponent's does not. A single case of the absolute incompatibility of the opposite hypothesis with any one of the ascertained facts is sufficient to overthrow it, at least in the form hitherto accepted; but mere uncertainties and difficulties prove nothing. One single circumstance which admits of one explanation only, is more decisive than an hundred others which agree in all points with one's own hypothesis, but are equally well explained on an opposite hypoth-

considered irrelevant or untrue, and then to fit to what remained, on the one side, the hypothesis of the claimant's identity, on the other side, the hypothesis of his non-identity, with Roger Tichborne. Of the clash of these hypotheses we have the following masterly summary by Lord C. J. Cockburn: —

“The defendant tells us he left Boisdale and Dargo, and led a wandering life, acting as a horse-breaker, and again as a stock-driver and butcher's man, and then set up as butcher. How should that have entered into the thoughts of Roger Tichborne? In addition to that, we have to look at the life of hardship, toil, privation, and at times of distress, through which the defendant represents himself to have passed. Upon what possible hypothesis can we conceive that Roger Tichborne would have adopted that life? Let it be granted, if you please, that he was a man of eccentric disposition, — although if we except this part of his alleged conduct, I can see no trace of eccentricity, — let it be supposed that he was a man capable of betaking himself to a wild and adventurous life, being sated, we will assume, with the pleasures and enjoyments of the life which he had previously led. But was this a life of adventure and interest? Was it a life which a man would adopt from any of the somewhat strange but still elevated feelings which have induced men to quit society and betake themselves to the desert? Do you find anything of that sort in it? It is the commonplace life of Arthur Orton. The defendant represents himself as having followed exactly the life which Arthur Orton would have followed, — which any one going out to find employment under similar circumstances in that new world, because it might be wanting in this, would have led. But it is just the life which, judging from experience, a man in Roger Tichborne's position would not have submitted to. For we have to ask ourselves, why should Roger Tichborne have led this life? Why should a man in his position, with an independent fortune of his own of £1,000 a year, which no one could touch; the heir to a title and to large estates of at least £20,000 a year; lead this species of life as stock-keeper, or butcher's man, or butcher, or horse-breaker, out in Australia? Very honest occupations if a man honestly pursues them, but not occupations

esis, which has originated from our op- See *Silver Mining Co. v. Fall*, 6 Nev.
ponent's side of the question.” *Ibid.* 116; *James v. State*, 45 Miss. 572.

which you would expect a man of rank and fortune to adopt. For what imaginable purpose? And from what possible motive? What is the suggestion? What account does the defendant himself give of it? The only reason he assigns is that he did not intend to come back to Europe until his father died. But how long was he to wait? Would not a man under those circumstances have taken some means to keep himself informed of whether his father was still living or not? And then for this supposed determination not to come back to Europe or England so long as the father lived, what authority do we find in the letters of Roger Tichborne? He intimates no such intention. All he says is he shall not be much at Tichborne and will not reside there as long as his parents are alive. That is all he says. His letters from South America clearly intimate an intention, though not of immediate, yet of eventual return. And then there is another consideration which I think must not be lost sight of. If there was one person in the world whom Roger loved, it was his brother Alfred. One sees in his letters about his brother that he really was fond of the boy, very fond of him. He always speaks of Alfred with playful tenderness, which is about one of the best forms in which affection can show itself. Could Roger with his acquaintance with the dispositions of the property, fail to know that when his father died, if he gave no signs of life, his brother Alfred would step naturally, in the ordinary course of things, into the possession of the title and estates which he would be supposed to be entitled to? Could he have failed to know that grown to man's estate, Alfred would form a union with some lady in his own position in life? Could he fail to appreciate the humiliation it would be to his brother and his brother's wife and children, if, having assumed the title and had the enjoyment of the estates, they had to step down from the position they had taken, and to give up both the one and the other? No brother could fail, I think, to be conscious of the false position — the painfully false position — in which he was placing, or possibly placing his brother, by allowing that brother to take a place he ought not to assume, and from which place he would be displaced, if the rightful owner afterwards came forward. Again, it seems difficult to bring one's self to believe that a man in Roger Tichborne's position, if living, would have

allowed years and years to pass, and his father, a man already very far advanced in years, to go down to his grave, without ever taking the slightest trouble to inform himself whether the father was alive or not. Again, Roger Tichborne was an indefatigable correspondent, always anxious for news of home. To the very last he begs each person whom he addresses to write to him at the earliest moment in return. Can we suppose that, because he found himself in Anstralia, he would have abstained for a long series of years from all communication with home, and would have knowingly left father, mother, and friends, in horrible uncertainty as to his fate? Can we suppose him to have been wanting in the common feelings of our nature? His was not the case of a man driven into exile by the unkindness of relations or the abandonment of friends, under reverse of fortune, or the sense of desperation which sometimes leads men under such circumstances to disconnect themselves from all former associations, and to renounce forever the ties which bind us to the world in which we have lived. Then we find, further on, that the defendant makes a marriage which it is difficult to suppose that Roger Tichborne, unless led away by some strong passion and infatuation, such as does not appear to have existed, would have made. It is a marriage which we cannot suppose he would have formed, if he had intended at any time to come back to this country. Is there anything to show us that he did not intend to come back to this country? The manner of its solemnization is consistent with its being the marriage of a Dissenter, but not of a Roman Catholic. Conscious of this, prior to coming forward as Roger Tichborne, he has his marriage solemnized again according to the Roman Catholic rite; and on signing his name to the register we have, as I have already pointed out, the remarkable fact that in writing the name of Tichborne he was about to write it 'Titchborne,' and only held his hand when the 't' was partially formed; the half of it remains visible. Could Roger Tichborne have done this? Again, the statement of the age, while it agrees with that of Orton, does not agree with that of Roger Tichborne by several years. Again — though it is touching on the same subjects and going over the same ground, yet it applies to this part of the case as well as the other — can we persuade ourselves that Roger could have written that Richardson letter? What

motive can be suggested? What purpose can be conceived? In no particular have the explanations of the defendant, I am sure you will agree with me, been less satisfactory than in respect of this remarkable letter.”¹

§ 14. When the issue involves, not a single question of identity, as did the Tichborne case, but a question of unknown authorship, then the uses of hypotheses are still more striking. Who, for instance, was the author of Junius? On the one side we have a group of settled facts, — concealment; idiosyncrasies of style, of information, of handwriting; political partialities; duration of correspondence; presence in London at particular periods. On the other side, we have half a dozen claimants, on whom these facts are to be successively tried, to see if they fit. We have a similar necessity in cases when an injury is inflicted, imputable to one of several supposed causes, our duty then being to see which of these agencies produced the result. A man, for instance, is found bruised and stunned by a railway track. Was it his own negligence that worked the injury? Was it the negligence of those operating the railroad? Was it the malice of some third person who wished to hurt, and took this way of concealing his tracks? Or a life insurance company is sued, and the evidence shows that a charred body, resembling that of the insured, was found in the smouldering ruins of a workshop in Baltimore. A good deal of evidence goes to show design in the burning; a good deal to show traces of a person, claimed to be the supposed deceased, wandering in other places, after the fire; other evidence gives ground to infer that he was afterwards actually murdered, near West Chester, Pennsylvania, by one of those concerned in insuring his life, in order to get him out of the way.² To such a case as the last we have the following several hypotheses to be successively applied: —

1. That the body found in the burned workshop was that of the insured, and that he met his death through *casus*.

2. That it was his body, but that his death was voluntary on his part, he intending to defraud the insurers for the benefit of his family.

¹ Cockburn, C. J., charge in Tichborne case, II. 794.

² See this case, in one of its final

conditions, reported under the name of *Com. v. Udderzook*, in the Appendix to Whart. on Hom. 2d ed.

3. That it was not his body, and that at the time of the suit he was still alive.

4. That the body was not his, but that before suit brought he was dead, the murdered body found near West Chester being his.

The *proof* in such a case consists in showing the applicability of one of these hypotheses to the facts. The facts are meaningless unless they fit to an hypothesis. Juridical conviction may be therefore defined to be the fitting of facts to hypothesis. If, in criminal issues, there is reasonable doubt whether the facts fit the hypothesis of guilt, then there must be an acquittal. In civil issues, when there are conflicting hypotheses, the judgment must be for that for which there is a preponderance of proof.

§ 15. It will hereafter¹ be seen that ordinarily the opinion of a witness, not an expert, cannot be asked as to a particular condition. At the same time it must be remembered that, as we have just seen, opinion, so far as it represents an induction from certain given facts, can in few cases be excluded, because there are few statements of facts which are not inductions. The statement, for instance, already adverted to, "I saw A. shoot B.," is an induction; the witness not seeing the ball strike B., but inferring that it did from the report of the pistol and the wound. We may take another illustration from a ruling in 1871 of the New York court of appeals, — a court peculiarly rigorous in applying the distinction between opinion and fact. The plaintiff was injured by a railway collision, and having sued the railway company, her attendant was asked on the trial whether she was able to help herself, and whether she needed assistance. Answers to these questions required the expression of the witness's opinions, and nothing else. The plaintiff's inability was a conclusion drawn by the witness from the plaintiff's conduct. But the witness's answer that the plaintiff was not able to help herself, was held admissible, for the reason that the conclusion was one which was in itself an abbreviation of the facts.² Opinions, therefore, which are abbreviations of the facts, are admissible, when the facts, though not expressed, are implied.³

Facts cannot be absolutely detached from opinion.

¹ Infra, § 509.

² See fully, infra, §§ 509-10.

³ Sloan v. R. R. 45 N. Y. 125.

CHAPTER II.

RELEVANCY.

Relevancy is that which conduces to the proof of a pertinent hypothesis, § 20.	From one part similar qualities of another part may be inferred, § 39.
Whatever so conduces is relevant, § 21.	So in questions of negligence, § 40.
Process one of logic, applicable to all kinds of investigation, § 22.	Evidence of prior firings admissible against railroad for negligent firing, § 42.
So in questions of identity, § 24.	When system is proved, conditions of other members of the same system may be proved, § 44.
Mr. Stephen's theory of relevancy, § 25.	Ownership may be inferred from system, § 45.
Criticism of this theory, § 26.	Character not relevant in civil issue, § 47.
Conditions of an hypothesis, whose proof is relevant, may be prior, contemporaneous, or subsequent, § 27.	When character is at issue, general reputation can be proved, § 48.
Non-existence of such conditions is also relevant, § 28.	Character is convertible with reputation, § 49.
Collateral disconnected acts generally irrelevant, § 29.	Character may be proved to increase or mitigate damages, § 50.
<i>Scienter</i> may be proved inductively by collateral facts, § 30.	In suits for seduction, bad character of plaintiff may be shown, § 51.
So may intent in trespass, § 31.	So in suits for breach of promise, § 52.
So in libels and slander, § 32.	So in suits for slander or libel, § 53.
So in fraud, § 33.	So in suits for malicious prosecution, § 54.
So in adultery, § 34.	Burden is on party assailing character, § 55.
So may good faith, § 35.	Particular facts cannot be put in evidence, § 56.
So may prudence and wisdom, § 36.	
So in questions of identity and <i>alibi</i> , § 37.	
System may be proved to rebut hypothesis of accident or <i>casus</i> , § 38.	

§ 20. RELEVANCY is that which conduces to the proof of a pertinent hypothesis.¹ A will, for instance, is contested, and several hypotheses are presented, on either of which, if proved, the instrument would be invalid. The signature, for instance, may have been forged, or the testator insane, or he may have been fraudulently induced to execute a paper different from that which he had in view. To each of these hypotheses a series of counter hypotheses are conceivable. If the hypothesis set up for the defence is forgery, then all facts which

Relevancy is what conduces to proof of a pertinent hypothesis.

¹ See as to hypothesis, *supra*, § 12.

are conditions of forgery are relevant. A party, for instance, sued on a bill sets up forgery ; to meet this hypothesis it is admissible for the plaintiff to prove that the defendant, at the time of the making of the bill, was trying to borrow money.¹ If the hypothesis set up for the defence is fraud, then all facts which are conditions of fraud are relevant. Or, to take another illustration : a prairie is fired, it is said, by a passing locomotive ; the hypothesis of the plaintiff is that the firing was by negligence, and for the plaintiff all the conditions of negligence are relevant. The defence sets up *casus*, or contributory negligence ; and then, on the part of the defence, it is relevant to prove the conditions of either of the latter hypotheses.

§ 21. Hence it is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less improbable. Nor is it necessary at once to offer all the circumstances necessary to prove such proposition. The party seeking to prove or disprove the proposition may proceed step by step, offering link by link. Whatever is a condition, either of the existence or of the non-existence of a relevant hypothesis, may be thus shown.² But no circumstance

¹ *Stevenson v. Stewart*, 11 Penn. St. 307.

² *R. v. Pearce*, Pea. R. 75 ; *R. v. Egerton*, R. & R. 375, cited by Holroyd, J., in *R. v. Ellis*, 6 B. & C. 148 ; *R. v. Briggs*, 2 M. & Rob. 199, per Alderson, B. ; *R. v. Rooney*, 7 C. & P. 517 ; *R. v. Fursey*, 6 C. & P. 81 ; *M. of Anglesey v. Ld. Hatherton*, 10 M. & W. 235, per Ld. Abinger ; *Furneaux v. Hutchins*, 2 Cowp. 807 ; *Doe v. Sisson*, 12 East, 62 ; *Schuchardt v. Allens*, 1 Wall. 359 ; *Butler v. Watkins*, 13 Wall. 457 ; *Deitsch v. Wiggins*, 15 Wall. 540 ; *Wiggin v. Scammon*, 27 N. H. 360 ; *Hovey v. Grant*, 52 N. H. 569 ; *Raynes v. Bennett*, 114 Mass. 424 ; *Fitzgerald v. Pendergast*, 114 Mass. 368 ; *Com. v. Dowdican*, 114 Mass. 257 ; *Huntsman v. Nichols*, 116 Mass. 521 ; *Willis v. Hulbert*, 117 Mass. 151 ; *Com. v. Sturtivant*, 117

Mass. 122 ; *Com. v. Costley*, 118 Mass. 1 ; *Hill v. Crompton*, 119 Mass. 376 ; *Furnas v. Durgin*, 119 Mass. 500 ; *Paine v. Farr*, 118 Mass. 74 ; *Blanchard v. N. J. S.* 59 N. Y. 292 ; *Haughey v. Strickler*, 2 Watts & S. 411 ; *Pratt v. Richards*, 69 Penn. St. 53 ; *Thompson v. Stevens*, 71 Penn. St. 161 ; *Arnold v. Bank*, 71 Penn. St. 287 ; *Confer v. McNeal*, 74 Penn. St. 112 ; *Brooke v. Winters*, 39 Md. 505 ; *Comstock v. Smith*, 20 Mich. 338 ; *Welch v. Ware*, 32 Mich. 77 ; *Marquette R. R. v. Langton*, 32 Mich. 251 ; *Willoughby v. Dewey*, 54 Ill. 266 ; *Hough v. Cook*, 69 Ill. 581 ; *Hancock v. Wilson*, 39 Iowa, 47 ; *Johnson v. Filkington*, 39 Wise. 62 ; *Baker v. Lyman*, 53 Ga. 339 ; *Selma v. Keith*, 53 Ga. 178 ; *Rucker v. Man. Co.* 54 Ga. 84 ; *Ashley v. Martin*, 50 Ala. 537.

is relevant which does not make more or less probable the proposition at issue.¹

§ 22. What has been said applies to all lines of investigation of truth. "What we at present call the cuneiform inscriptions of Cyrus, Darius, Xerxes, Artaxerxes I., Darius II., Artaxerxes Mnemon, Artaxerxes Ochus (of which we now have several editions, translations, grammars, and dictionaries), — what were they originally? Process is logical, and applicable to all lines of investigation.

A mere conglomerate of wedges, engraved or impressed on the solitary monument of Cyrus in the Murgháb, on the ruins of Persepolis, on the rocks of Behistún near the frontiers of Media, and the precipice of Van in Armenia. When Grotefend attempted to decipher them, he had first to prove that these scrolls were really inscriptions, and not mere arabesques or fanciful ornaments. He had then to find out whether these magical characters were to be read horizontally or perpendicularly, from right to left, or from left to right. Lichtenberg maintained that they must be read in the same direction as Hebrew. Grotefend, in 1802, proved that the letters followed each other, as in Greek, from left to right; even before Grotefend, Münter, and Tyehsen had observed that there was a sign to separate the words. Such a sign is of course an immense help in all attempts at deciphering inscriptions, for it lays bare at once the terminations of hun-

¹ *Infra*, § 29; *Carter v. Pryke*, Pea. R. 95; *Backhouse v. Jones*, 6 Bing. N. C. 65; *S. C.* 8 Scott, 148; *Hollingham v. Head*, 4 C. B. (N. S.) 388; *Rew v. Hutchins*, 10 C. B. (N. S.) 829; *Howard v. Sheward*, L. R. 2 C. P. 148; *Lucas v. Brooks*, 18 Wall. 436; *Sherman v. Trans. Co.* 31 Vt. 162; *Van Buren v. Wells*, 19 Wend. 203; *Carey v. Bright*, 58 Penn. St. 70; *Borden Co. v. Barry*, 17 Md. 419; *Sevarcool v. Farwell*, 17 Mich. 308; *Nason v. Woodward*, 16 Iowa, 216; *Bryant v. Ingraham*, 16 Ala. 116.

"We agree with the defendant's counsel that, as a general rule, no evidence should be admitted till the court can see that it is admissible. Where, however, the admissibility of evidence depends upon several facts, to some extent independent of each other, and where each fact must be proved to complete the chain of evidence, the exercise of a sound judicial discretion does not require the court, uniformly, to interfere in the order of the testimony. A beginning must be made somewhere; and when, as in the present case, the court is satisfied that the party is acting in good faith, and intends fairly to supply each particular link till the chain of testimony is perfect, the evidence, as offered, may come in, subject to objection, to be stricken out and go for nothing if the necessary connecting portion be not supplied." *Foster, J., Moppin v. Aetna Axle & Spring Co.* 41 Conn. 34.

dreds of words, and, in an Aryan language, supplies us with the skeleton of its grammar. Yet consider the difficulties that had still to be overcome before a single line could be read. It was unknown in what language these inscriptions were composed ; it might have been a Semitic, a Turanian, or an Aryan language. It was unknown to what period they belonged, and whether they commemorated the conquests of Cyrus, Darius, Alexander, or Sapor. It was unknown whether the alphabet used was phonetic, syllabic, or ideographic. It would detain us too long were I to relate how all these difficulties were removed one after the other ; how the proper names of Darius, Xerxes, Hystaspes, and of their god Ormuzd, were traced ; how from them the values of certain letters were determined ; how with an imperfect alphabet other words were deciphered which clearly established the fact that the language of these inscriptions was ancient Persian ; how then, with the help of the Zend, which represents the Persian language previous to Darius, and with the help of the later Persian, a most effective cross-fire was opened ; how even more powerful ordnance was brought up from the arsenal of the ancient Sanskrit ; how outpost after outpost was driven in, a practical breach effected, till at last the fortress had to surrender and submit to the terms dictated by the Science of Language.”¹

§ 23. A similar series of progressive tests are applied in order to exhibit the meaning of any controverted writing. A memorandum, for instance, in a foreign language, is put in evidence, for the purpose of proving a debt. The plaintiff sets up, first, that the instrument is, we may say, in German ; secondly, that certain phrases in it have, by the custom of trade, a meaning different from that they bear in ordinary use. Here are two hypotheses successively presented in order to get at the meaning of the instrument ; and whatever goes to prove either of these hypotheses is relevant. The number of the hypotheses increases and diminishes with the complication of the case. If, for instance, Sir Philip Francis's title to the authorship of Junius is under investigation, we have a series of concentric hypotheses, each of which is pertinent, and the innermost of which closely surrounds the point of identity. It is pertinent to argue, that the author of Junius, during the Chatham and Grafton ministries,

¹ Müller's Lectures on Language, 6th ed. vol. ii. Lect. I.

was familiar with English public life; that he possessed a practised pen; that he was cognizant of the traditions of the war-office; that his animosity to Lord Mansfield, and his attachment to Lord Chatham, were strong; that he had cogent motives for concealment both at the particular period and for years afterwards; that he ceased to write about 1773; that his handwriting had certain marked peculiarities. Each of these hypotheses being pertinent, it is relevant to prove that Sir Philip Francis was, during the period when the Junius letters appeared, familiar with English public life; that his style was polished, vigorous, and not unlike that of Junius; that he had been for some time a clerk in the war-office; that his political relations repelled him from Lord Mansfield and connected him with Lord Chatham; that to him discovery would be political ruin; that about the time the Junius letters closed he left the country; that his handwriting was strikingly similar to that of Junius.¹

§ 24. In questions of identity we have abundant illustrations of the principles just announced. Thus in an action of trover for the conversion of a heifer, which both parties claimed to have raised, where there are conflicting hypotheses of identity, it is relevant to ask a witness who has testified to having been among the plaintiff's herd of cattle for two or three years as to their tameness, as to their habits, and even as to their most general characteristics.² So, recurring to a more conspicuous illustration, to take the Tichborne case, we have both on the part of the plaintiff and of the defendant a succession of

So in questions of identity.

¹ "This is in accordance with the general rule in such cases, that proof is admissible of every material fact that will help to identify the person or thing intended, and which will enable the court to put themselves as near as may be in the situation of the parties to the deed; and then when the court, by the aid of all these facts, can ascertain the intention of the parties, and especially of the grantor, they will construe the deed so as to give effect to that intention when they can find enough in the description, after rejecting all the particulars in which it is

false or mistaken, to identify the land." *Lane v. Thompson*, 43 N. H. 320; *Tenney v. East Warren Lumber Co.* 43 N. H. 313; *Goodhue v. Clark*, 37 N. H. 526; *Shore v. Wilson*, 5 Scott's N. R. 958; *Emerson v. White*, 29 N. H. 482, 498; *Webster v. Atkinson*, 4 N. H. 21; *Bullen v. Runnels*, 2 N. H. 258; *Cocheco Man'f. Co. v. Whittier*, 10 N. H. 305; *Richardson v. Palmer*, 38 N. H. 212; *Harvey v. Mitchell*, 31 N. H. 582; *Swain v. Saltmarsh*, 51 N. H. 16.

² *De Armond v. Neasmith*, 32 Mich. 231.

pertinent concentric hypotheses, the conditions of either of which it was relevant to prove. On the part of the plaintiff, for instance, the hypothesis was that the legal owner of the Tichborne estates was Roger Tichborne, who was educated in France, who returned when a young man to England for a few years, which he spent carelessly if not dissolutely; that he quarrelled with his father and mother, and sailed on a voyage of adventure to the new world; that he was wrecked in South America, and then found his way to Australia; that in Australia he was employed as a butcher, under the name of Castro, was married, and acquired a home; that upon the death of his father and uncle, he concluded to return to England; that he was the plaintiff in the ejectment case on trial. On the part of the defence the hypothesis was that the defendant was Arthur Orton, a boy trained in a Wapping butcher's store, who led a vagrant life in South America and Australia for years, and then, when settled in Australia, having seen in the London Illustrated News a sketch of the wanderings and of the leading characteristics of the lost heir to the Tichborne estates, undertook to personate that long-sought individual, and was, by force of such personation, the plaintiff in court. Here, on the part of both plaintiff and defendant, there was a succession of pertinent hypotheses, the conditions of which it was relevant to prove. No matter how slight may be the inference of identity to be drawn from any single fact, it is admissible as a fragment of the material from which the induction is to be made. One hundred thousand persons may be in a city at the time when in that city a particular act is done, and proving A. to have been in the city at the time makes a case against him, which is by itself only as one against one hundred thousand, yet it is nevertheless relevant to prove that he was at the time in the city. Multitudes of persons having to work with kerosene have kerosene stains on their clothes, yet, when on the trial of a person charged with burning a house, the hypothesis of the prosecution being that an accomplice of the defendant fired the building by means of a can of kerosene oil furnished for the purpose for the defendant, it is relevant for the prosecution to prove that the shirt of the accomplice, when he fired the building, had on it kerosene stains.¹

¹ State v. Kingsbury, 58 Me. 239.

§ 25. Mr. Fitzjames Stephen, to whose energy and eloquence the cause of law reform is under great indebtedness, has given a theory of relevancy differing in several minor points from that which is here expressed. Accord- Mr. Stephen's theory of relevancy. ing to Mr. Stephen,¹ "Evidence may be given in any action of the existence or non-existence of any fact in issue, and of any fact relevant to any fact in issue, and of no others. . . . Facts, which, though not in issue, are so connected with a fact in issue as to form part of the same transaction or subject matter, are relevant to the fact with which they are so connected. . . . Facts, whether in issue or not, are relevant to each other, when one is, or probably may be, or probably may have been, —

"The cause of the other ;

"The effect of the other ;

"An effect of the same cause ;

"A cause of the same effect ;

or when the one shows that the other must or cannot have occurred, or probably does or did exist, or not ; or that any fact does or did exist, or not, which in the common course of events would either have caused or have been caused by the other ; provided that such facts do not fall within the exclusive rules " before stated, "or the exceptions " afterward stated.

These exclusions and exceptions are afterwards thus specified : "*Similar but unconnected facts.* The occurrence of a fact similar to, but not specifically connected in any of the ways hereinbefore mentioned with the facts in issue, is not to be regarded as relevant to the existence of such facts except in the cases specially excepted in this chapter." The exceptions are, —

Acts showing intention, good faith, &c. ;

Facts showing system ;

Existence of a particular course of business ;

Acts showing that a particular person assumed to be a public officer.

To Mr. Whitworth, an English barrister, we are indebted for the following modification of Mr. Stephen's scheme : —

RULE I. — No fact is relevant which does not make the existence of a fact in issue more likely or unlikely, and that to such a degree as the judge considers will aid him in deciding the issue.

¹ Digest of the Law of Evidence, London, 1876, p. 4 *et seq.*

RULE II. — Subject to Rule I., the following facts are relevant: —

1. Facts which are part of, or which are implied by, a fact in issue; or which show the absence of what might be expected as a part of, or would seem to be implied by, a fact in issue.

2. Facts which are a cause, or which show the absence of what might be expected as a cause, of a fact in issue.

3. Facts which are an effect, or which show the absence of what might be expected as an effect, of a fact in issue.

4. Facts which are an effect of a cause, or which show the absence of what might be expected as an effect of a cause, of a fact in issue.

RULE III. — Facts which affirm or deny the relevancy of facts alleged to be relevant under Rule II. are relevant.

RULE IV. — Facts relevant to relevant facts are relevant.

§ 26. While adopting, as will hereafter be seen, several of Mr.

Criticism
of the
above.

Stephen's positions, there are two criticisms I offer as explaining why I cannot accept his scheme as affording a complete solution of the difficulties which beset this branch of evidence. In the first place, the words "cause" and "effect" are open, when used in this connection, to an objection which, though subtle, is in some cases fatal. The "cause" of a fact in issue, it is alleged, is relevant; yet whether such a cause produced such a fact is the question the action is often instituted to try; and it is a *petitio principii* to say that the "cause" is relevant because it is the "cause," and that it is shown to be the cause because it is relevant. In the second place, the distinction between "facts in issue" and "facts relevant to facts in issue" cannot be sustained. An issue is never raised as to an evidential fact; the only issues the law knows are those which affirm or deny conclusions from one or more evidential facts. This is shown by Mr. Stephen's own illustration: "A.," he says, when explaining the supposed distinction, "is indicted for the murder of B., and pleads not guilty. The following facts may be in issue: the fact that A. killed B.; the fact that at a time when A. killed B. he was prevented by disease from knowing right from wrong; the fact that A. had received from B. such provocation as would reduce his offence to manslaughter. The following facts would be relevant to the issue: the fact that A.

had a motive for murdering B. ; the fact that A. admitted that he had murdered B. ; the fact that A. was, after B.'s death, in possession of property taken from B.'s person." If we scrutinize the group of facts classified in the last quotation as "facts in issue," we will find that as they are facts which could not be put in evidence, they are not relevant facts, though they might be relevant hypotheses to be sustained by relevant facts. If counsel should ask a witness whether "A. killed B.," the question would, if excepted to, be ruled out, on the ground that it called, not for "facts," but for a conclusion from facts, and to such conclusions witnesses are not permitted to testify.¹ Equally summarily would be dismissed the questions whether "A. knew right from wrong," and whether "A. had received from B. such provocation as would reduce his offence to manslaughter." The only way of proving either of these "facts in issue," as they are called by Mr. Stephen, is by means of what he calls "facts relevant to the issue." Did A. kill B. ? We cannot say that it would be relevant to the issue for a witness to say, "A. killed B.," for a witness would not be permitted so to testify. No facts are relevant which are inadmissible ; and the fact that A. killed B., being in this shape inadmissible, is irrelevant. It is, however, admissible, to take up Mr. Stephen's illustration of facts relevant to the issue, to prove that "A. had a motive for murdering B., the fact that A. admitted that he had murdered B. ; the fact that A. was, after B.'s death, in possession of property taken from B.'s person." From such facts, taken in connection with facts which lead to the conclusion that A. struck the blow from which B. died, the hypothesis that A. murdered B. is to be verified or discarded. The same line of observations is applicable to the second and third of the "facts in issue" mentioned by Mr. Stephen. The proof of A.'s inability to distinguish right from wrong, and of the extenuation of his offence through hot blood, can only be made by proving "facts relevant to the issue" from which irresponsibility or hot blood can be inferred. We must therefore strike out from the category of relevant facts what Mr. Stephen calls "facts in issue," or what may be more properly called pertinent hypotheses, and limit ourselves to the position that all facts relevant to "facts in issue" (or to pertinent hypotheses) are, as a rule, ad-

¹ See *infra*, § 507.

missible. If we discard, as ambiguous, the word "fact," and substitute for it, as has previously been done, the word "condition" (corresponding to the logical "*differentia*" or incident), then the position we may accept is that all conditions of a pertinent hypothesis are relevant to the issue; and that such conditions may be either proved or disproved.

§ 27. Conditions, the presence or absence of which may be thus proved, may be regarded as either prior, contemporaneous, or subsequent. A debt, for instance, for goods sold, as is contended, is sued for. Among the prior conditions of the hypothesis (or contention) of indebtedness may be mentioned the possession, by the plaintiff, of the goods. As contemporaneous conditions are to be classed what we call the *res gestae*, or circumstances of the sale. Among the subsequent conditions is the conduct of the debtor, more or less effectively admitting the debt. Or damages are claimed in a suit for injuring cattle by running them down on a railroad. Among the prior conditions of the liability are the unfenced condition of the road and the running of the locomotive at full speed over the unfenced sections. Among the contemporaneous conditions are the *res gestae*. Among the subsequent conditions are the admissions of parties entitled to speak for the railroad company.¹ In other cases we may regard as relevant conditions a party's subsequent conduct showing good faith;² the subornation of witnesses to give a false account of a past transaction;³ subsequent acts of adultery to prove a prior act of adultery;⁴ subsequent defamatory words to prove the *animus* of prior defamation.⁵

§ 28. In the same way that the existence of the conditions of a pertinent hypothesis are provable, so also are the non-existence of such conditions provable, whether they be prior, contemporaneous, or subsequent.⁶ Thus, when the hypothesis of the plaintiff is that the defendant's engines were ill-constructed; that at the time of the alleged firing they profusely emitted sparks; that the fire, by the ordi-

¹ See *infra*, § 1173.

² *Gerish v. Chartier*, 1 C. B. 13.

³ *Melhuish v. Collier*, 15 Q. B. 878.

⁴ *Boddy v. Boddy*, 30 L. J. Pr. & Mat. 23.

⁵ *Pearson v. Le Maitre*, 6 Scott N.

R. 607; 5 M. & Gr. 700; *Warwick v. Foulkes*, 12 M. & W. 507; *Simpson v. Robinson*, 12 Q. B. 511.

⁶ See *Sheen v. Bumpstead*, 2 H. & C. 193; *Gerish v. Chartier*, 1 C. B. 13.

nary and natural progress, consumed the plaintiff's house, it is relevant for the defendant to prove the absence of conditions which would be the probable if not necessary conditions of such hypothesis. So, the defendant may show that his engines were so constructed as to make the profuse emission of fire highly improbable; that the coals that escaped fell on the bed of the road, on which there was no accumulation of combustible material; and that the fire by which the plaintiff was injured was traceable to the negligence of other parties. Or, when the hypothesis of the plaintiff is that when A. and B. perished in the same ship at sea, A. survived B., it is admissible for the defendant to show that before the shipwreck A. was stronger than B.; that at the time of the shipwreck A. was in a better place for the prolongation of life than B.; and that after the shipwreck there were traces of A. having escaped the common and immediate death of those remaining in the ship.¹ Or, *alibi* being the hypothesis set up by the defence, it is admissible to prove even independent crimes committed by the defendant if such proof refutes the hypothesis of *alibi*.²

§ 29. As a general rule, therefore, it is inadmissible, when the issue is whether A. did a particular thing, to put in evidence the fact that he did a similar thing at some other time. The reasons why this rule should be maintained are obvious. To admit evidence of such collateral acts would be to oppress the party implicated by trying him on a case as to which he has no notice to prepare, and sometimes by prejudicing the jury against him by publishing offences of which, even if guilty, he may have long since repented, or may have long since been condoned. Trials would by this process be injuriously prolonged, the real issue obscured, and verdicts taken on side issues.³ To sustain the introduction of such collateral facts, they must be in some way capable, as will presently be seen more fully, of being brought into a common system with

Collateral
discon-
nected
facts gen-
erally irrel-
evant.

¹ See *infra*, § 1280.

² *R. v. Briggs*, 2 M. & Rob. 199;
R. v. Rooney, 7 C. & P. 517.

³ *Griffiths v. Payne*, 11 A. & E. 131;
Thompson v. Mosely, 5 C. & P. 502;
R. v. Mobbs, 6 Cox C. C. 223; *Goodrich v. Wilson*, 119 Mass. 429; *State*

v. Whittier, 8 Shepl. 341; *Com. v. Miller*, 3 Cush. 243; *Williams v. Fitch*, 18 N. Y. 546; *Mailler v. Propeller Co.* 61 N. Y. 312; *Cole v. Com.* 5 Grat. 696; *Williams v. State*, 45 Ala. 57, and cases cited *supra*, § 21.

that under trial. Thus, in an action against the acceptor of a bill by an indorsee, the defence being forgery, it was held irrelevant to introduce proof that a collection of bills, on which the defendant's name had been forged, had been in the plaintiff's possession, and that some of them had been circulated by him, the reason given being that there was no distinct proof that the bill in question had ever formed part of that collection.¹ So the fact that a party draws his notes generally in a particular way is not evidence to prove that he drew a specific note in such a way.²

§ 30. Knowledge, however, must usually be proved inductively from facts by which notice to the party can be inferred; and hence, within well ascertained limits, evidence of overt acts, of the same class as that under investigation, is admissible for the purpose of proving *scienter* or intent, or of negating accident. A party, for instance, is charged with holding or circulating forged paper, or other documents, as to which it is important to prove his *scienter*. One of such papers he may hold without being justly chargeable with knowledge of its character; when three or four are traced to him, suspicion thickens; if fifteen or twenty are shown to have been in his possession at different times, then the improbability of innocence on his part in this relation is in proportion to the improbability that the papers could have found themselves in his possession without his knowing their true character.³

The evidence of *scienter* is of course much strengthened by proof that the party had notice, on a prior occasion, that suspicion attached to paper of the same character as that he is now charged with illegally holding or passing.⁴

¹ Griffiths v. Payne, 11 A. & E. 131. See Thompson v. Mosely, 5 C. & P. 502. In Griffiths v. Payne, it was said by Lord Denman that such evidence would be inadmissible on an indictment for forgery. It certainly would, to prove that the paper was forged, but it could be received to prove *scienter*, assuming a forgery.

² Iron Mountain Bk. v. Murdock, 62 Mo. 70.

³ R. v. Fuller, R. & R. 308; R. v.

Harris, 7 C. & P. 429; R. v. Roebuck, 36 Eng. Law & Eq. 631; Com. v. Hall, 4 Allen, 305; Com. v. Edgerly, 10 Allen, 184; R. v. Pascoe, Pearce & D. 456; U. S. v. Burns, 5 McLean, 23; State v. Twitty, 2 Hawks, 449; People v. Farrell, 30 Cal. 316. See cases in Whart. Cr. Law, § 647; Taylor on Ev. § 322.

⁴ R. v. Hough, R. & R. 120; R. v. Hodgson, 1 Lew. 103; R. v. Forster, Dear. 456; R. v. Francis, L. R. 2 C.

So when the hypothesis proposed is that A. received certain articles from B., knowing them to be stolen, it is relevant to show that A. had received and pledged to other parties a series of other articles, proved to have been stolen by B.¹ Again, the contention being that A., the acceptor of a bill of exchange, knew that the name of the payee was fictitious, it has been held relevant to prove that A. had accepted other bills in the same manner before they could have been transmitted to him by the payee, if the payee had been a real person.² Knowledge, in such case, may be inferred when it is more probable than ignorance. Thus, where a plaintiff sought to set aside a contract on the ground of his having been insane when it was made; the court held, upon an issue as to whether or not the defendant was at the time aware of the insanity, that evidence of the plaintiff's conduct, at different times both before and after the date of the contract, was admissible, for the purpose of showing that the madness was of such a character as must have been apparent to any one, who had had opportunities of observation like those afforded to the defendant.³

§ 31. To prove intent similar evidence is pertinent. One blow given to A. by B. may be accidental; few counsel would have the audacity to claim accident for eight or ten blows given to A. by B. at successive intervals, under varying conditions.⁴

So may
intent in
trespass.

§ 32. One letter sent by A. to B., demanding money, may be ambiguous; it may cease to appear so if seen in the light of a series of prior letters demanding money, with threats whose purport is unmistakable.⁵

So in
libel and
slander.

The hypothesis of the plaintiff in an action for libel or slander is that the libel was malicious; to prove malice it is relevant for the plaintiff to prove continuous defamation by the defendant for ten years,⁶ and for this purpose acts of defamation subsequent

C. R. 128; *State v. McAllister*, 24 Me. 139; *Com. v. Stearns*, 10 Met. 256; *Hendrick v. Com.* 5 Leigh, 708; *Mason v. State*, 42 Ala. 532.

¹ *Dunn's case*, 1 Mood. C. C. 146.

² *Stephen's Evidence*, 18, citing *Gibson v. Hunter*, 2 H. Bl. 288.

³ *Beavan v. McDonnell*, 10 Ex. R. 184.

⁴ *R. v. Voke*, R. & R. 531; *So-*

donski v. McGee, 4 J. J. Marsh. 267. See *Spencer v. Thompson*, 6 Ir. C. L. R. (N. S.) 537, 571; *Com. v. McCarthy*, 119 Mass. 351.

⁵ *R. v. Robinson*, 2 Leach, 749; *R. v. Boucher*, 4 C. & P. 562; *R. v. Cooper*, 3 Cox C. C. 547.

⁶ *Barrett v. Long*, 3 H. L. Cas. 395, 414.

to that in issue are admissible.¹ No subsequent libels, however, can be admitted, if they do not relate to the same general subject matter as that charged;² though repetitions, even after action brought, are admissible.³ It is scarcely necessary to add that any insulting acts, preceding or accompanying a defamatory publication, can be put in evidence as illustrating its motive.⁴ On the other hand, in mitigation of damages, the defendant has been allowed to prove that he copied the libel from another newspaper,⁵ or that he had been provoked by attacks on him by the defendant,⁶ provided such libels relate to the general subject of the trial,⁷ or are generally calculated to provoke.⁸

§ 33. Fraud in an assignment is the question in dispute; to solve this question it is admissible to prove that the assignor at the same time made other conveyances clearly in fraud of creditors.⁹ Nor is a plaintiff, in a suit charging the defendant with fraud, confined to the fraudulent misstatements set out in the declaration; other illustrative fraudulent misstatements may be put in evidence.¹⁰

¹ *Pearson v. Le Maitre*, 6 Scott N. R. 607; 5 M. & Gr. 700. See, also, *Hemmings v. Gasson*, E., B. & E. 346; *Perkins v. Vaughan*, 4 M. & Gr. 988. In *Warwick v. Foulkes*, 12 M. & W. 509, the defendant to an action for false imprisonment pleaded, first, not guilty; and secondly justification, to the effect that the plaintiff had committed a felony. It was held that although the defendant subsequently withdrew and apologized for the plea of justification, it might be taken into account as going to show malice.

² See *Finnerty v. Tipper*, 2 Camp. 72; *Watson v. Moore*, 2 Cush. 133.

³ *Townsend on Libel*, § 390. See, as to general rule, *Baldwin v. Soule*, 6 Gray, 321; *Robbins v. Fletcher*, 101 Mass. 115; *Mix v. Woodward*, 12 Conn. 262; *Williams v. Miner*, 18 Conn. 464; *Howard v. Sexton*, 4 N. Y. 157; *Kennedy v. Gifford*, 19 Wend. 296.

⁴ *Bond v. Douglas*, 7 C. & P. 626; *Kean v. McLaughlin*, 2 S. & R. 469.

See *C. v. A. B.*, 2 Weekly Notes, 291.

⁵ *Saunders v. Mills*, 6 Bing. 213; affirmed in *Pearson v. Le Maitre*, 6 Scott N. R. 607, 5 M. & Gr. 700.

⁶ *Taylor's Ev.* § 322, citing *Watts v. Frazer*, 7 A. & E. 223; *Tarpley v. Blabey*, 2 Bing. N. C. 437; 4 Scott, 642; *May v. Brown*, 3 B. & C. 113; *Hotchkiss v. Lothrop*, 1 Johns. 286.

⁷ *May v. Brown*, *ut supra*.

⁸ See *Wakley v. Johnson*, Ry. & M. 422; *Thomas v. Dunaway*, 30 Ill. 373; *Botelar v. Bell*, 1 Md. 173; *Pugh v. McCarty*, 40 Ga. 444.

⁹ *Stockwell v. Silloyay*, 113 Mass. 384; *Cook v. Moore*, 11 Cush. 216.

¹⁰ *Huntingford v. Massey*, 1 Fost. & F. 690.

"Fraud being alleged, a wide range is given in proof of circumstances tending to establish it, it being a matter of secrecy generally. It is only by collecting together numerous circumstances oftentimes that it can be brought to the light and exposed."

§ 34. The same line of reasoning leads, in suits for adultery, to the admission of other adulterous acts about the same time,¹ or even subsequent to that in issue.²

So in adultery.

§ 35. It is sometimes important to determine whether a party, in doing a particular thing, acted in good faith. In the old practice his mouth was sealed; and in such cases his good faith could be only shown by inferences from circumstances. Under our present practice he may be examined as to his reasoning and motives;³ but such evidence is necessarily open to suspicion, since it undertakes to prove good faith by an appeal to the very good faith which is to be proved. If the party is destitute of good faith, he cannot be a reliable witness to prove good faith; and independently of this technical criticism, we know by experience that there are few objects as to which memory is so treacherous as our past motives and reasonings, if we separate these motives and reasonings from the facts by which they are induced. Hence it has been properly held that when good faith is at issue, it is relevant to put in evidence facts which would justify such good faith.⁴ One of the most striking illustrations of this rule is to be found in homicide cases, in which it is admissible, in order to sustain the *bona fides*

Good faith may be inferred from facts likely to produce it.

Hall v. Stanton, Sup. Ct. Penn. 2 Weekly Notes, 578; Brown v. Shook, 77 Penn. St. 471.

“Where fraud in the purchase or sale of property is in issue, evidence of other frauds of like character committed by the same parties, at or near the same time, is admissible. Its admissibility is placed on the ground that where transactions of a similar character, executed by the same parties, are closely connected in time, the inference is reasonable that they proceed from the same motive. The principle is asserted in Cary v. Hotailing, 1 Hill, 311, and is sustained by numerous authorities. The case of fraud, as there stated, is among the few exceptions to the general rule that other offences of the accused are not relevant to establish the main charge.

See, also, Hall v. Naylor, 18 N. Y. 588, and Castle v. Bullard, 23 Howard, 172.” See, also, R. v. Holt, Bell C. C. 280; Hovey v. Grant, 52 N. H. 569.

As to the latitude allowed in cases of fraud, see Simons v. Vulcan Co. 61 Penn. St. 202; Heath v. Page, 63 Penn. St. 108; Woods v. Gummert, 67 Penn. St. 136; Brown v. Schoek, 77 Penn. St. 471; Stewart v. Fenner, 2 Weekly Notes, 511.

¹ Com. v. Nicholls, 114 Mass. 285.

² Boddy v. Boddy, 30 L. J. Pr. & Mat. 23; Thayer v. Thayer, 101 Mass. 111, overruling Com. v. Thrasher, 11 Gray, 450.

³ Infra, § 482.

⁴ See Melhuish v. Collier, 15 Q. B. 878. And see infra, § 252.

of a party who claims that he believed he was acting in self-defence, for him to show that he had been advised of threats on the part of his assailant to take his life.¹ So, where the question was whether the defendant had represented herself to the plaintiff as a married woman, and had been *bonâ fide* trusted by the plaintiff as such, it was held that it would be relevant for the plaintiff to show that he had previously heard that the defendant had represented herself as a married woman to other parties.² So in a case already noticed, where the hypothesis on which the plaintiff rested was that he was insane at the time of a particular contract, it was held admissible for him, in order to sustain the *bona fides* of this hypothesis, and the fact that his insanity must have been known to the other contracting parties, to prove, by his conduct at the time in question, that he must have been regarded as insane by those who dealt with him.³ So, where the plaintiff's case was that the defendant represented to the plaintiff that D. was solvent, when he knew the contrary, it is relevant, to disprove this hypothesis, to show that at the time when the defendant made the representations D. was, to the defendant's knowledge, supposed to be solvent by his neighbors and customers.⁴ Contemporaneous and subsequent acts may also be received to prove good faith. Thus, where A. is sued by B. for the price of work done by B., by the order of C., a contractor, upon a house of which A. is owner, and where A.'s defence is that B.'s contract was solely with C., it is relevant for A., in order to show that in good faith he made over to C. the absolute and sole control of the work, to prove that he paid C. the entire sum necessary to pay for such work.⁵

§ 36. What has been said as to the admissibility of independent acts as a basis from which good faith may be inferred, applies with peculiar force to the admission of such facts when there is a contest as to whether prudence or diligence was exercised by a particular person at a particular time. For instance, on a question as to whether an

¹ See Whart. on Homicide, § 694. See, also, Watts v. Frazer, 7 A. & E. 223. And infra, §§ 252, 269.

² Barden v. Keverberg, 2 M. & W. 61.

³ Beavan v. McDonnell, 10 Ex. R. 188.

⁴ Sheen v. Bumpstead, 2 H. & C. 193; S. C. in Exch. 1 H. & C. 358.

⁵ Stephen's Evidence, 18, citing Gerish v. Chartier, 1 C. B. 13.

engineer, in the management of a train at a collision, acted prudently, there is no doubt that it would be admissible to prove the cries of bystanders without producing such bystanders. So in an action for malicious prosecution, when the question was, what influenced a magistrate to do a particular act, it has been held admissible to put in evidence a letter to the magistrate, without calling the person by whom the letter was written.¹ So in all cases in which prudence and diligence are to be shown, it is admissible to put in evidence all the facts by which prudence and diligence are to be gauged.²

§ 37. If identity is disputed, it is admissible, in order to defeat the hypothesis of non-identity, to prove that a person, like the party charged, was engaged about the same time in similar acts, even though these acts are independent crimes.³ Or if an *alibi* is set up, it is relevant, in order to defeat the hypothesis of *alibi*, to prove that the defendant, at the time he is alleged to have been absent, was present, perpetrating independent crimes.⁴

Collateral facts may be introduced to prove identity or refute *alibi*.

§ 38. When as a defence to a suit for an injury inflicted by A. on B. the hypothesis is set up that the injury was accidental or the result of *casus*, it is admissible, in order to defeat this hypothesis, to show that similar injuries were inflicted by A. on B., or on other parties, to an extent which renders the hypothesis of accident or *casus* improbable. "When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant."⁵ A conspicuous illustration of this rule is afforded in prosecutions for poisoning, in which, to rebut the hypothesis set up by the defendant of accident, it is admissible for the prosecution to show that the defendant had been concerned in prior fatal operations with the same or similar drugs.⁶ So when, to an indictment for malicious shooting, the hypothesis of accident is set up, to meet this it is

System may be proved to rebut hypothesis of accident or *casus*.

¹ Taylor v. Willans, 2 B. & Ad. 845.

⁴ Ibid.

² See Whart. on Neg. §§ 26-69.

⁵ Stephen's Evidence, 19. See R. v. Bleasdale, 2 C. & K. 768.

³ R. v. Briggs, 2 M. & Rob. 199; R. v. Rooney, 7 C. & P. 517.

⁶ See cases given in Whart. Cr. Law, § 635.

admissible to show a prior intentional shooting of the prosecutor by the defendant.¹

A defendant, to take another case, pleads *casus* in answer to the charge of firing his house in order to defraud the insurers. To meet this it is admissible for the prosecution to prove that on several prior occasions houses occupied by the defendant had been burned, and that he obtained payment for the same from separate insurance companies.² In the same line may be mentioned a New York ruling, that evidence of an attempt to set fire to a barn, in the same village, and on the same night, in which the building in litigation was burned, is admissible on the issue of accident.³

§ 39. We may, in fine, conclude generally that when a mass of action is examined in block, it is allowable to assume, as a presumption of fact, that if a part of it is tainted in a particular way, the rest is so tainted. Thus where most of the vouchers produced by a party, in proving his accounts, show an overcharging of items, it may be inferred, as a presumption of fact, that a like proportion of the items not vouched are overcharged.⁴

In this relation, also, may be mentioned the reception in evidence, in cases in which the probable value of a life estate is concerned, or the probable duration of life is to be estimated, of approved scientific calculations, such as the Carlisle Tables. These tables are based on an induction from a large number of particulars, and in this way reach a general rule which, for business purposes, is assumed to apply to new cases that may arise.⁵ The same reasoning supports the admission of evidence based on the habits of men generally. These habits are inferred from a large number of particulars; and in this way a general rule is reached which is applied to a new particular case.⁶ To the same effect may be cited the ruling already given, that in an action for fraudulently representing that a trader was trustworthy, it is allowable for the defendant to call fellow-townsmen of the trader to state, that, at the time when the representation was made, the man was, according to their belief, in good credit.⁷ Again, A.,

¹ R. v. Voke, R. & R. 531.

⁴ Bush v. Guion, 6 La. An. 798.

² R. v. Gray, 4 F. & F. 1102.

⁵ See *infra*, § 667.

³ *Faucett v. Nichols*, N. Y. Ct. of Appeals, 1876; S. C. 4 N. Y. Sup. Ct. 597.

⁶ *Infra*, § 1296.

⁷ *Sheen v. Bumstead*, 1 H. & C. 358; *aff.* 2 H. & C. 193.

being employed to pay the wages of B.'s laborers, is required to enter in a book the specific sums paid out. The book is found to contain one item overstating the amount paid, and A. is charged with making a fraudulent entry. It is relevant for the prosecution, in order to refute accident, to show that for a period of two years A. had made other similar false entries in the same book, all the errors being in his own favor.¹ So, in an action for an assault and consequent injury, where evidence for the defence was given that the plaintiff had ascribed her injury to a previous accident, she was allowed to show that in fact no such accident had ever occurred.² So, where a hog, when trespassing on the defendant's land, was shot twice, about an hour intervening between the shots, and the defendant was seen to fire the second shot, it was held that there was evidence from which a jury might infer that he fired the first shot.³ So, in a case elsewhere noticed, upon the question arising whether the acceptor of a bill of exchange had empowered generally the drawer to draw on him in favor of fictitious persons, it was held admissible to show that he had accepted similar bills, drawn in like manner, under circumstances which showed he must have inferred the payee to be fictitious.⁴ At the same time it must be remembered that a party's habits in doing business cannot ordinarily be put in evidence to show that he did a certain thing in a particular way.⁵

§ 40. Ordinarily, when a party is sued for damages flowing from negligence imputed to him, it is irrelevant, for reasons already given, to prove against him other disconnected though similar negligent acts. Thus, in an action against a bailee for the loss of property intrusted to him, evidence of independent acts of negligence not connected with the loss, is inadmissible.⁶ So, where the question, in a suit against a railway company, is whether a driver was negligent on a particular occasion, it is irrelevant to prove that he had been negligent on other occasions.⁷

¹ Stephen's Evidence, 20, citing R. v. Richardson, 2 F. & F. 343.

² Melhuish v. Collier, 15 Q. B. 878.

³ Landell v. Hotchkiss, 1 Thomp. & C. (N. Y.) 580.

⁴ Gibson v. Hunter, 2 H. Bl. 288.

⁵ Iron Mountain Bk. v. Murdock, 62 Mo. 70. Supra, § 29.

⁶ First Nat. Bank of Lyons v. Ocean Nat. Bank, 60 N. Y. 279.

⁷ "The only error that occurred in the trial in the court below was in the

§ 41. But when a party is charged with the negligent use of a dangerous agency, and when the case against him is that he did

admission of the testimony that the driver had been seen on several previous occasions to stop the car suddenly. The plaintiff's complaint was that in consequence of a sudden stop he was thrown from the platform, and injured by being run over.

"The question for the jury, supposing he had satisfied them that he was in the exercise of due care, was as to the exercise of the like degree of care on the part of the defendant at the time of the accident. The fact that the same driver had at some other times been guilty of careless or unskilful management could have no legitimate bearing upon the question as to the care or skill exhibited at the time in controversy. This evidence was objected to, and the plaintiff's counsel appear to have yielded to the objection, and to have proceeded no further in this line of inquiry. It is true that it does not appear that it was afterwards alluded to, either by the counsel or the court, but it had been given in the trial, and we do not find anywhere any instruction to the jury to disregard it. It is impossible to say that it did not have some influence upon their decision, and the case therefore comes within the rule laid down in *Brown v. Cummings*, 7 Allen, 507. See, also, *Ellis v. Short*, 21 Pick. 142; *Farnum v. Farnum*, 13 Gray, 508. The plaintiff had ceased to pursue the inquiry, but the evidence, so far as he had gone, was in, against the defendant's objection. The only way to prevent the jury from regarding it as legal and material was to give them a distinct ruling that it was not so, and this does not appear to have been done." *Ames, J., Maguire v. Middlesex Railroad Co.* 115 Mass. 240.

So in an action against a town to recover for injuries caused by a defect in a highway which the town is bound to keep in repair, evidence of an injury sustained a year before, at the same place, by a third person, of which the town had notice, is inadmissible, especially if it appears that the highway has been in the same condition for twenty-four hours before the injury sued for. *Blair v. Pelham*, 118 Mass. 420.

"The evidence of what happened at the same place the year before was rightly rejected, because it tended to raise a collateral issue, and because, it being admitted that the highway had been in the same condition for twenty-four hours before the injury now sued for, the previous length of time for which it had existed was immaterial. *Aldrich v. Pelham*, 1 Gray, 510; *Payne v. Lowell*, 10 Allen, 147." Gray, C. J., *Blair v. Pelham*, 118 Mass. 420.

To this effect may be cited the following opinion of the supreme court of Missouri: "The first question presented by the record, for consideration in this court, is as to the propriety of the action of the court in permitting the plaintiffs to prove on the trial that other fires had happened along the line of the defendant's railroad during the fall of the year 1872, in the vicinity of the place where the plaintiffs' hay was burned, which was caused by the escape of the fire from some of the defendant's engines.

"It is insisted by the plaintiffs that this evidence was admissible to rebut the evidence of the defendant tending to prove the absence of negligence on its part. The evidence in the case clearly shows that if the fire was communicated to the plaintiffs' hay by

not use care proportionate to the danger, then the question becomes material whether he knew, or ought to have known, the extent of the danger. On such an issue as this it is relevant for the party aggrieved to put in evidence of disconnected acts, of which it was the duty of the defendant to have been cognizant, and which, if he were cognizant of them, would have advised him of the extent of the danger, and would have made it his duty to take precautions which would, if faithfully applied, have prevented the injury sued for. Thus, in an action against

sparks or fire escaping from the defendant's engine, it was so communicated from engine No. 6, which had just passed the place when the fire was discovered. The evidence in chief of the only witness examined on the part of the defendant was directed to the proof of facts, to show that said engine No. 6 was a good, safe engine, which was supplied with the most approved 'spark arresters,' and that it was, at the time of the fire, manned by competent and careful servants, &c. The evidence elicited by the cross-examination of the witness by the plaintiffs elicited the fact that all the locomotives or engines, used on the defendant's road, were provided with the same kind of 'spark arresters.' The plaintiffs, in order to rebut the evidence thus brought out by themselves, claim that they had a right to prove that other fires had occurred along the railroad of defendant, caused by the escape of fire from some of the defendant's engines.

"This evidence, it seems to me, was collateral to the issues in the case. To prove that some one of defendant's engines was insufficient, or that the hands on some of said engines had so carelessly conducted the same as to permit the escape of fire, is not competent evidence to prove that the persons conducting engine No. 6, on the 20th of October, 1872, were negli-

gent, or that the said engine was insufficient; and said evidence could not be made competent by the attempt thereby to rebut evidence which was wholly immaterial, and which had been elicited by the plaintiffs. The evidence was collateral, and ought to have been excluded by the court. *Baltimore & Susquehanna R. R. Co. v. Woodruff*, 4 Md. 242, and cases there cited.

"The law as settled in this state is, that where it is proved that the property was destroyed by fire escaping from the defendant's engine, a *prima facie* case of negligence is made out, that the burden is then thrown on the defendant, by its evidence, to rebut the presumption of negligence by showing the absence of negligence. Whether this is done by the evidence is a question for the jury, which can be decided by them without shifting the burden from one party to the other, as the evidence progresses, and as seems to be contemplated by the instruction refused. *Bedford v. Hann. & St. Jo. R. R. Co.* 46 Mo. 456; *Clemens v. Hann. & St. Jo. R. Co.* 53 Mo. 366, and cases cited." *Vories, J., Coale v. Hann. & St. Jo. R. R. Co.* 60 Mo. 232.

See, to same effect, *Lester v. R. R.* decided by the same court, and reported in *Cent. Law Jour.*, Oct. 1 1875.

a railroad company for injuries sustained from a car running off the track, evidence has been received to prove seven or eight runnings off the track on the same road, by the same line of cars, in the previous month.¹ So, in a suit by A. against B. for damages to A. through a ferocious dog negligently kept by B., it has been held relevant for A. to show that the dog had previously bitten X., Y., and Z., and that they had complained to B. of their hurts so sustained.²

§ 42. If the plaintiff should prove that his house was fired by sparks emitted by engine No. 1, on the defendants' road, is it relevant for him to show that in a series of former occasions, sparks were emitted by the same engine in such masses as to fire other property? For the reasons just stated, we must hold such evidence to be relevant. The fact that the engine has frequently caused damage of this kind, indicates defects in its construction which impose upon its owner, if not its condemnation, at least the exercise of peculiar care both in its repair and its management; and that such care was applied, the burden, after proof of frequent fires caused by the same engine, is on him to show. On the other hand, suppose that after the plaintiff proves a firing from engine No. 1, he offers to show a series of prior firings from engines Nos. 2, 3, 4, 5, and 6, without offering to show that there was such identity of construction of the engines as a mass as to make it probable that the defects in engines Nos. 2, 3, 4, 5, and 6, existed in engine No. 1. In such case the proof of firing from any other engine than No. 1 would be as irrelevant, as, in an action by A. for hurt from a kick of a horse belonging to B., it would be irrelevant to show that on other distinct occasions other horses of B. had kicked C., D., and E.³

§ 43. Suppose, however, that when evidence of prior firing by

¹ *Mobile R. R. v. Ashcroft*, 48 Ala. 15.

² *Stephen's Evidence*, 17, citing *Roscoe's Nisi Prius*, 739; *Whart. on Neg.* 912; *Worth v. Gilling*, L. R. 2 C. P. 1; *Kittredge v. Elliott*, 16 N. H. 77; *Whittier v. Franklin*, 46 N. H. 23; *Arnold v. Norton*, 25 Conn. 92; *Buck-*

ley v. Leonard, 4 Denio, 500; *Cock-erham v. Nixon*, 11 Ired. L. 269; *McCaskill v. Elliot*, 5 Strobb. 196; *Keenan v. Hayden*, 39 Wise. 558.

³ *Erie R. R. v. Decker*, 78 Penn. St. 293. See *Waugh v. Shunk*, 20 Penn. St. 130; *Carson v. Godley*, 26 Penn. St. 111.

certain specified engines is offered, there is no identification, on the part of the plaintiff, of the engine by which the fire was emitted; or suppose that though that particular engine is identified, there is no identification of the engines causing the prior fires, is the evidence relevant? We have now to touch a question of probabilities which has already been noticed; and we may adduce, in explanation, the same illustration. Although there were one hundred thousand people of a particular class at a particular place at a particular time, yet it is relevant to prove that A. was at that place at that time, when the question is whether A. did something that could only have been done at that place and time. So, when an offer is made of a series of firings from a series of unidentified locomotives on the same road, such offer is relevant as one of the conditions of an hypothesis which charges a particular locomotive with the firing. Of weight, if disconnected with other evidence, it cannot be; relevant, for the reasons just stated, it certainly is. "The third assignment of error," so speaks Mr. Justice Strong, in giving an opinion to this effect in the supreme court of the United States in 1876,¹ "is that the plaintiffs were allowed to prove, notwithstanding objection by the defendants, that at various times during the same summer, before the fire occurred, some of the defendants' locomotives scattered fire when going past the mill and bridge, without showing that either of those which the plaintiffs claimed communicated the fire were among the number, and without showing that the locomotives were similar in their make, their state of repair, or management to those claimed to have caused the fire complained of. The evidence was admitted after the defendants' case had closed. But whether it was strictly rebutting or not, if it tended to prove the plaintiffs' case, its admission as rebutting was within the discretion of the court below and not reviewable here. The question, therefore, is, whether it tended in any degree to show that the burning of the bridge and the consequent destruction of the plaintiffs' property was caused by any of the defendants' locomotives. The question has often been considered by the courts in this country and in England, and such evidence has, we think, been generally held

¹ Grand Trunk R. R. v. Richardson, 91 U. S. (1 Otto) 454.

admissible as tending to prove the possibility and a consequent probability that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company."¹ Or again: if the defendants should set up the hypothesis of *casus*, or of one of those occasional mechanical aberrations which due diligence cannot exclude, then it is relevant to show, as militating against this hypothesis, that other

¹ As concurring in this conclusion may be cited: *Aldridge v. R. R.* 3 Man. & G. 515; *Piggott v. R. R.* 3 C. B. 229; *Boyce v. R. R.* 42 N. H. 97; 43 N. H. 627; *Cleveland v. R. R.* 42 Vt. 449; *Sheldon v. R. R.* 14 N. Y. 218; *Field v. R. R.* 32 N. Y. 339; *Westfall v. R. R.* 5 Hun. (N. Y.) 75; *Huyett v. R. R.* 23 Penn. St. 373; *R. v. McClelland*, 42 Ill. 358; *St. Jos. R. R. v. Chase*, 11 Kans. 47; *Longabaugh v. R. R.* 9 Nev. 271; *Penns. R. R. v. Stranahan*, 32 Leg. Int. 449; 2 Weekly Notes, 215. In the last case, the plaintiff's barn, situate 100 feet from the railroad track, was destroyed by fire, which, it was proved, had spread along the ground from the track to the barn. In the absence of any evidence tracing the cause of the fire to any particular engine, the court below admitted evidence, offered by the plaintiff under objection, to show that at a distance of twenty miles from plaintiff's property various locomotives of defendant had cast large sparks which had caused other fires near the line of the road. It was held that the evidence was receivable. "This was not a case," said the court, "where a certain engine had thrown out the sparks which set fire to the plaintiff's barn, but it was one where the engine was unknown, yet the cause of the fire was clearly traced to the railroad track, and left the belief that some one of the engines of the defendants had emitted the coals which set the barn on fire. It, therefore, became necessary to es-

tablish the fact by such proof as rendered the belief a certain fact. This could be done not by the proof that a certain engine emitted sparks unusually; *non constat* that this particular engine had passed the plaintiff's premises on that day. Hence it was necessary to permit the party to show that the emitting of coals and sparks in unusual quantities was frequent, and permitted to be done by a number of engines. The range of the evidence in this respect of necessity carried it to a greater range as to locality also." In Maryland, this conclusion was at one time disapproved. *Balt. R. R. v. Woodruff*, 4 Md. 242. But more recently, in an action against a railroad company for so negligently managing one of its engines, that certain cordwood and growing timber of the plaintiff, whose land adjoined the road, was destroyed by fire emitted from the engine, the plaintiff, for the purpose of proving that the fire in question was occasioned by the defendant's engine, and as tending to prove negligence on the part of the defendant in the construction and management of its engines, may show that, within a week before the fire in question, the engines of the defendant in passing had scattered large sparks which were capable of setting fire to combustible articles along the road, and that frequent fires, occasioned by such sparks, had been put out within that time. *Annap. R. R. v. Gantt*, 39 Md. 115.

engines, constructed on the same general system as that by which the engine occasioning the fire was constructed, had emitted sparks to an extent from which negligence in the construction of the engines, if not in the care of them, may be inferred.¹ To meet another probable hypothesis such evidence

¹ In *Sheldon v. R. R.* 14 N. Y. 221, above cited, Denio, J., said: "I think, therefore, it is competent *prima facie* evidence, for a person seeking to establish the responsibility of the company for a burning upon the track of the road, after refuting every other probable cause of the fire, to show that, about the time when it happened, the trains which the company were running past the location of the fire were so managed in respect to the furnaces as to be likely to set on fire objects not more remote than the property burned. . . . The evidence . . . not only rendered it probable that the fire was communicated from the furnace of one of the defendant's engines, but it raises an inference of some weight that there was something unsuitable and improper in the construction or management of the engine which caused the fire." And see *Hinds v. Barton*, 29 N. Y. 544; *Field v. N. Y. Cent. R. Co.* 32 N. Y. 339; *Webb v. R. W. & O. R. R. Co.* 49 N. Y. 424.

In *Longabaugh v. The Virginia, &c. R. R. Co.* 9 Nevada, 271, it was said: "What are the facts of this case? Plaintiff's wood caught fire in some manner, to him, at the time unknown. How did the fire originate? This was the first question to be established in the line of proof. Positive testimony could not be found. The plaintiff was compelled, from the necessities of the case, to rely upon circumstantial evidence. What does he do? He first shows, as in the New York case, the improbabilities of the fire having originated in any other way except from coals dropping from

the defendant's engines. He then shows the presence, in the wood-yard, of one of the engines of the defendant, within half an hour prior to the breaking out of the fire. Then proves that fires have been set in the same wood-yard within a few weeks prior to this time, from sparks emitted from defendant's locomotives. I think such testimony was clearly admissible, under the particular facts of this case, upon the weight of reason as well as of authorities. . . . The evidence was admissible, as tending to show a probable cause of fire, and to prevent vague and unsatisfactory surmises on the part of the jury. Upon the question of negligence, it was admissible as tending to prove that if the engines were, as claimed by defendant, properly constructed and supplied with the best appliances in general use, they could not have been properly managed, else the fires would not have occurred. There is not, in my judgment, any substantial reason for the objection urged to this testimony, on the ground that it referred to other engines than the one shown to be present on the day of the fire. The business of running the trains on a railroad supposes a unity of management and general similarity in the fashion of the engines and character of their operation." And in the same case it was held proper to follow up the evidence of fires about the time of that complained of with evidence of fires extending back over a period of four years. The court citing, with approbation, the language of Davis, J., in *Field v. N. Y. Cent.*

may be relevant. It may be maintained by the defendants that the object fired was beyond the reach of sparks from their engine. In answer to this it has been held relevant for the plaintiff to prove that a short time before the defendants' engines, when passing the same point, emitted sparks which fell further than the building for whose firing the plaintiff sues.¹

§ 44. The rule that when a system is established, the conditions of other members of the system may be proved to affect the case in court, has been further illustrated in cases in which the customs of one manor are put in evidence to affect other manors of the same system. No rule is better established, or more frequently acted upon, than that which precludes the customs of one manor from being given in evidence to prove the cus-

When system is proved, conditions of other members of the same system may be shown.

R. R. Co. 32 N. Y. 339: "The more frequent these occurrences, and the longer time they had been apparent, the greater the negligence of the defendant, and such proof would disarm the defendant of the excuse that on that particular occasion the dropping of fire was an unavoidable accident." A witness was permitted to testify that she had seen fire on the defendant's track four weeks after the fire complained of. This fire was caused by coals dropped from another engine. It was held that this evidence was properly admitted. The court said: "Certainly such testimony would have been admissible if directed against the 'I. E. James,' the offending engine. But there is no pretence that the 'I. E. James' is differently constructed from the 'Reno,' or any other locomotive on defendant's road; or that any different appliances are used to prevent the emission of sparks from the smoke-stack, or the dropping of coals from the ash-pan. It was within the power of defendant, which must necessarily have intimate relations with all its engineers, conductors, and employees, to prove these facts, if they existed. The *onus probandi* is upon the defend-

ant. If one or more of its engines drops coals from its ash-pan, or emits sparks and cinders from its smoke-stack just prior to or soon after property on the line of its track has been destroyed by fire without any known cause or circumstance of suspicion besides the engines, it becomes incumbent upon the railroad company to show that their engines were not the cause." See a learned article in Cent. Law J. for Oct. 1, 1875, from which the last summary is taken.

¹ Ross v. R. R. 6 Allen, 87; Sheldon v. R. R. 14 N. Y. 218; Burke v. R. R. 7 Hiesk. 451. See Piggott v. R. R. 10 Jurist, 571; 3 C. B. 229; Aldridge v. R. R. 3 M. & G. 515.

In Rhode Island, "in an action against a railroad company for burning the plaintiff's property by sparks from their locomotive, evidence that fires on the line of the road have originated from sparks escaping from defendants' locomotives before the occurrence of the one in question, is ruled relevant, in order to enable the jury to judge whether the defendants, in view of the previous occurrence of such fires, exercised reasonable care at the time this one happened; but evidence of

toms of another ; because, as each manor may have customs peculiar to itself, to receive the peculiar customs of another manor, in order to show the customs of the manor in question, would be inadmissible as a disconnected fact, by the rule above stated, and would put an end to all question as to the peculiar customs in particular manors, by throwing them open to the customs of all surrounding manors.¹ But whenever a connection between the manors is proved, such customs become admissible. It is not enough, it is true, to show merely that the two lie within the same parish and leet ; nor even that the one was a subinfeudation of the other ; at least, unless it be clearly shown that they were separated after the time of legal memory, since otherwise they may have had different immemorial customs.² On the other hand, the customs of manors become reciprocally admissible if it can be proved that the one was derived from the other after the time of Richard the First ;³ and it has been also held that if the customs in question be a particular incident of the general tenure which is proved to be common to the two manors, evidence may be given of what the custom of the one is as to that tenure, for the purpose of showing what is the custom of the other as to the same.⁴ We will elsewhere see that value

fires occurring from this cause subsequently to the one in question is held inadmissible, unless the possibility of communicating fire by sparks from a locomotive is disputed by the defendants, in which case it is admissible solely for the purpose of proving such possibility." *Smith v. O. C. & N. R. R. Co.* 10 R. I. 22.

¹ *M. of Anglesey v. Ld. Hatherton*, 10 M. & W. 235, per Ld. Abinger; *Furieux v. Hutchins*, 2 Cowp. 807; *Doe v. Sisson*, 12 East, 62; *Taylor's Ex.* § 300.

² *M. of Anglesey v. Ld. Hatherton*, 10 M. & W. 218.

³ *Ibid.* 212, 243, per Alderson, B.

⁴ *Ibid.*; *Stanley v. White*, 14 East, 338, 341, 342, per Ld. Ellenborough; *R. v. Ellis*, 1 M. & Sel. 662, per *Ibid.*; *D. of Somerset v. France*, 1 Str. 651; *Champion v. Atkinson*, 3 Keb. 90; ex-

plained by Rolfe, B., in 10 M. & W. 216, 247.

For the above illustration of the important principle that when system is proved, the pertinent incidents of other members of the system are relevant, I am indebted to Mr. Taylor (*Ibid.* § 300), who adds: "The manors on the border between England and Scotland (*Rowe v. Parker*, 5 T. R. 31; *Ld. Kenyon*), and those in the mining districts of Derbyshire and Cornwall, will furnish other examples of the application of this rule; since, throughout the former, a particular species of tenure called tenant-right, and in the latter, particular customs, as to the rights of the miners and the rights to the minerals, prevail; and consequently, if in one of the manors no example can be adduced of what is the custom in any particular case, it is only rea-

at one place can be used to infer value at another place when the two places are shown to belong to the same system.¹ So, on the same reasoning, the mode of conducting a particular branch of trade in one place has been proved by showing the manner in which the same trade is carried on in another place.² So a geological system being established, physical peculiarities of one member of the system are relevant as to other members. Thus on a question as to the exact line of boundary between the manors of Wakefield and Rochdale, which the plaintiff contended was the ridge of a mountain, whence the waters descended in opposite directions, he was allowed to prove, in support of this view, that the ridge of the *same range* of hills separated the manor of Rochdale from another manor which adjoined the manor of Wakefield; because this being a *natural* boundary, which was equally suitable in both cases, it was highly improbable that it should have been varied.³ Perhaps on this ground we may sustain a contested New Hampshire ruling where it was held admissible, in order to show that a particular horse was frightened at a certain object, to prove that other horses were frightened at the same object.⁴

§ 45. Even ownership may be thus inferred. Thus, upon a question whether a slip of waste land, lying between the high-

sonable that, in order to explain the nature of the tenure or right in question, which is not confined to a single manor, but prevails equally in a great number, evidence should be admissible to show what is the general usage with respect to that tenure or right. *M. of Anglesey v. Ld. Hatherton*, 10 M. & W. 237, per Lord Abinger. Thus, where in each of several manors belonging to the same lord, and forming part of the same district, a particular class of tenants called *assessional* tenants held the farms, to whom their tenements were granted by similar words, evidence of the rights enjoyed by those tenants in one manor was received, to show the extent of their rights in another. *Rowe v. Brenton*, 8 B. & C. 758; 3 M. & R. 361, S. C.

This last case, indeed, raised no question as to *manorial* title; for had there been no manor at all, precisely the same evidence would have been admissible, provided the land had been all held under the *assessional* tenure. Per Ld. Abinger, in *M. of Anglesey v. Ld. Hatherton*, 10 M. & W. 237, 238. See, also, *Jewison v. Dyson*, 9 M. & W. 540. See *Fleet v. Murton*, 41 L. J. Q. B. 49."

¹ See *infra*, § 1290.

² *Noble v. Kennoway*, 2 Doug. 510; *Taylor's Ex.* § 302.

³ *Brisco v. Lomax*, 8 A. & E. 198; 3 N. & P. 388, S. C.

⁴ *Darling v. Westmoreland*, 52 N. H. 401; *contra*, *Hawks v. Charlemont*, 110 Mass. 110. See *infra*, § 1295.

way and the inclosed lands of the plaintiff, belonged to him, or to the lord of the manor, it was held that the lord might give evidence of acts of ownership on other parts of the waste land between the *same* road and the inclosures of other persons, although at the distance of two miles from the spot in dispute, and although the continuity of the waste was interrupted for the space of some sixty or seventy yards by the intervention of a bridge, and some old houses.¹ It has also been held that where in trespass the object of the plaintiff was to prove himself the owner of the entire bed of a river flowing between his land and that of the defendant, and thus to rebut the presumption that each party was entitled *ad medium filum aquae*, he was at liberty to give in evidence acts of ownership exercised by himself upon the bed and banks of the river on the defendant's side, lower down the stream, where it flowed between the plaintiff's land and the farm of a third party, adjoining the defendant's property; and that he could also prove repairs which he had done, beyond the limits of the defendant's land, to a fence which, dividing that and other land from the river, ran along the side of the stream for a considerable distance, till it came opposite to the extremity of the plaintiff's property on the other side.²

Ownership may be inferred from system.

¹ Doe v. Kemp, 7 Bing. 332; 2 Bing. N. C. 102; 2 Scott, 9, S. C., recognized by Parke, B., in Jones v. Williams, 2 M. & W. 327, 328; Bryan v. Winwood, 1 Taunt. 208; Dendy v. Simpson, 18 Com. B. 831.

² Taylor's Ev. § 303, from which the recapitulation of the above cases is mainly taken; Jones v. Williams, 2 M. & W. 326. In Jones v. Williams, Parke, B., said: "I am also of opinion that this case ought to go down to a new trial, because I think the evidence offered of acts in another part of one continuous hedge, and in the whole bed of the river, adjoining the plaintiff's land, was admissible in evidence, on the ground that they are such acts as might reasonably lead to the inference that the entire hedge and bed of the river, and, consequently, the part in dispute, belonged

to the plaintiff. Ownership may be proved by proof of possession, and that can be shown by acts of enjoyment of the land itself; but it is, impossible, in the nature of things, to confine the evidence to the very precise spot on which the alleged trespass may have been committed; evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff if the other parts did. In ordinary cases, to prove his title to a close, the claimant may give in evidence acts of ownership in any part of the same inclosure; for the ownership of one part causes a reasonable inference that the other belongs to the same person;

§ 46. Relevancy in such case depending on system, the court must first determine as a prerequisite to relevancy, whether there is such a relation between the case in court and the case proposed as a test as to make it probable that the incidents of the one belong to the other.¹ Thus, where it was attempted to connect parcels of waste land with each other, merely by showing that they all lay within the same manor, and between inclosures and public roads, it was held that evidence of acts of ownership over some of these lands was inadmissible to prove title to the others.²

though it by no means follows as a necessary consequence, for different persons may have balks of land in the same inclosure; but this is a fact to be submitted to the jury. So, I apprehend, the same rule is applicable to a wood which is not inclosed by any fence; if you prove the cutting of timber in one part, I take that to be evidence to go to a jury to prove a right in the whole wood, although there be no fence, or distinct boundary, surrounding the whole; and the case of *Stanley v. White*, 14 East, 332, I conceive is to be explained on this principle: there was a continuous belt of trees, and acts of ownership on one part were held to be admissible to prove that the plaintiff was the owner of another part, on which the trespass was committed. So, I should apply the same reasoning to a continuous hedge; though no doubt the defendant might rebut the inference that the whole belonged to the same person, by showing acts of ownership on his part, along the same fence. It has been said in the course of the argument, that the defendant had no interest to dispute the acts of ownership not opposite his own land; but the ground on which such acts are admissible is not the acquiescence of any party; they are admissible of themselves *proprio vigore*, for they tend to prove that he who does them is the owner of the soil; though

if they are done in the absence of all persons interested to dispute them, they are of less weight. That observation applies only to the effect of the evidence. Applying that reasoning to the present case, surely the plaintiff, who claims the whole bed of the river, is entitled to show the taking of stones, not only on the spot in question, but all along the bed of the river, which he claims as being his property; and he has a right to have that submitted to the jury. The same observation applies to the fence and the banks of the river. What weight the jury may attach to it is another question."

¹ *Doe v. Kemp*, 7 Bing. 536.

² *Taylor*, § 305; *Doe v. Kemp*, 2 Bing. N. C. 102. Lord Denman, in giving judgment, observes: "If the lord has a right to one piece of waste land, it affords no inference, even the most remote, that he has a right to another, in the same manor, although both may be similarly situated with respect to the highway; assuming that all were originally the property of the same person, as the lord of the manor, which is all that the fact of their being in the same manor proves, no presumption arises from his retaining one part in his hands, that he retained another; nor, if in one part of the manor the lord has dedicated a portion of the waste to the use of the public, and granted out the adjoining land to pri-

§ 47. Although in criminal cases good character may be proved by the defendant, as tending to substantiate the plea of not guilty,¹ yet in civil suits such evidence has been held to be irrelevant. When the question comes whether the defendant has committed a crime, then, as a matter of indulgence to one whose life or liberty are at stake, good character, such as would make it improbable that he would have committed the crime in question, may be introduced among the elements from which the jurors are to make up their judgment. But whether it be because in a civil issue, between two private parties, neither has the right to claim such an indulgence from the other, or whether it be because most civil suits grow out of or may be supposed to grow out of honest misconceptions of rights, Anglo-American courts have agreed in holding that, so far as concerns the proof in civil issues, the character of either party is as a rule irrelevant.² So far has this been carried

Character
not ordi-
narily rele-
vant in
civil suit.

vate individuals, does it by any means follow, nor does it raise any probability, that in another part he may not have granted the whole out to private individuals; and they afterwards have dedicated part as a public road. But the case is very different with respect to those parcels, which from their local situation may be deemed parts of one waste or common; acts of ownership in one part of the same field, are evidence of title to the whole; and the like may be said of similar acts on part of one large waste or common." Pp. 107, 108. See, also, *Tyrwhitt v. Wynne*, 2 B. & A. 551; *Hollis v. Goldfinch*, 1 B. & C. 218, 219, per Bayley, J.

¹ See, fully, Whart. Cr. Law, 7th ed. § 636 *et seq.*

Ruan v. Perry, 3 Caines, 120, is sometimes cited as authority for the position that in actions for tort charging criminality, the defendant may put good character in evidence. In *Fowler v. Ins. Co.* 6 Cow. 675, and *Townsend v. Graves*, 3 Paige, 455, *Ruan v. Perry* is cited with qualified

approval; but it is emphatically repudiated in *Gough v. St. John*, 16 Wend. 646; *Pratt v. Andrews*, 4 Comst. 493; and *Porter v. Seiler*, 23 Penn. St. 424. See Bigelow's overruled cases, *in loco*, referring also to *Potter v. Webb*, 6 Greenl. 14; *Norton v. Warner*, 9 Conn. 172.

² *Elsam v. Faucett*, 2 Esp. 563; *Atty. Gen. v. Bowman*, 2 B. & P. 532, n.; *Atty. Gen. v. Radloff*, 10 Ex. R. 84; *Downing v. Butcher*, 2 M. & Rob. 374; *Jones v. Stevens*, 11 Price, 235; *Thayer v. Boyle*, 30 Me. 475; *Boardman v. Woodman*, 47 N. H. 120; *Wright v. McKee*, 37 Vt. 161; *Schmidt v. Ins. Co.* 1 Gray, 529; *McDonald v. Savoy*, 110 Mass. 49; *Gough v. St. John*, 16 Wend. 646; *Fowler v. Ins. Co.* 6 Cow. 693; *Townsend v. Graves*, 3 Paige, 453; *Pratt v. Andrews*, 4 Comst. 493; *Corning v. Corning*, 6 N. Y. 97; *Willis v. Forrest*, 2 Duer, 310; *Lockyer v. Lockyer*, Edm. S. C. 107; *Dain v. Wyckoff*, 18 N. Y. 45; *Porter v. Seiler*, 23 Penn. St. 424; *Anderson v. Long*, 10 S. & R. 55; *McKenney v. Rhoads*, 5 Watts, 343;

that in actions for malicious prosecution and for false imprisonment, the defendant, to sustain the defence of probable cause, cannot put the plaintiff's bad character in issue; though this proof may be offered in mitigation of damages.¹ So, where the issue was whether a devisee under a will was charged with fraudulently procuring the will, that being the issue, he was refused permission to prove his good character as a defence.² So in a bastardy suit, evidence that the complainant has had the reputation of being a prostitute for the three years preceding the accusation, is properly rejected.³ So that the plaintiff, in an action for assault, was not a person of sober habits, is inadmissible, on part of the defence, the offer being disconnected with any proposal to show that the plaintiff's want of sobriety contributed to his injury.⁴ So in actions for defamation, evidence of the plaintiff's good character is held irrelevant, even on a plea of justification, unless general character be put in issue.⁵

It has indeed been ruled that in slander, when the general issue only is pleaded, the plaintiff may prove his good character, at least to increase damages.⁶ But the better opinion is against

Church v. Drummond, 7 Ind. 19; *Morris v. Hazelwood*, 1 Bush, Ky. 208; *Smets v. Plunket*, 1 Strobbh. 372; *Ward v. Herndon*, 5 Port. 382; *Gutzwiller v. Lackman*, 26 Mo. 168. See *Potter v. Webb*, 6 Greenl. 14.

¹ *Downing v. Butcher*, 2 M. & Rob. 374; *Jones v. Stevens*, 11 Price, 235; *Newsam v. Carr*, 2 Stark. R. 69, overruling *Rodrigues v. Tadmire*, 2 Rep. 271; *Bacon v. Towne*, 4 Cush. 217; *Givens v. Bradley*, 3 Bibb, 192; *Bostick v. Rutherford*, 1 Hawks, 85; *Martin v. Hardesty*, 29 Ala. 458.

Where injury to character is disclaimed, character cannot be attacked. *Smith v. Hyndman*, 10 Cush. 554. See particularly *infra*, § 54.

In *Winchiddle v. Porterfield*, 9 Penn. St. 137, it was said that "perhaps" the defendant, in such case, might "show, for the purpose of mitigating the damages, and for no other purpose, that the character of the

plaintiff was bad on subjects unconnected with the charge made by the defendant." This is affirmed in *Bostick v. Rutherford*, 4 Hawks, 85. To same effect, see *Israel v. Brooks*, 23 Ill. 575. See *supra*, § 32.

² *Goodright v. Hicks*, Buller N. P. 296.

³ *Sidelinger v. Bueklin*, 64 Me. 371.

⁴ *Drohn v. Brewer*, 77 Ill. 280.

⁵ *Powell on Ev.* 515; *Cornwall v. Richardson*, R. & M. 305; *Brine v. Bazalgette*, 3 Exch. 692; *Wright v. Shroeder*, 2 Curtis C. C. 548; *Severance v. Hilton*, 22 N. H. (4 Fost.) 147; *Dame v. Kenney*, 23 N. H. (5 Fost.) 318; *Inman v. Foster*, 8 Wend. 602; *Harcourt v. Harrison*, 1 Hall, 474; *Petrie v. Rose*, 5 Watts & S. 364; *Chubb v. Gell*, 34 Penn. St. 114; *Harrison v. Shook*, 41 Ill. 142; *Haun v. Wilson*, 28 Ind. 296; *Holley v. Burgess*, 9 Ala. 728.

⁶ *Romayne v. Duane*, 3 Wash. C. C.

this concession ; on the ground that the law presumes a party's character to be good, and that it is superfluous for him to prove that which is presumed. Even when justification is set up by proving the charge, the plaintiff, so far has the rule been pushed, cannot prove his good character in rebuttal.¹ But when the plaintiff's good character is directly attacked, then evidence going to his whole pertinent general reputation may be introduced.² But on an information in the exchequer, filed by the attorney general, charging the defendant with keeping false weights, he was held not entitled to give evidence of good character, on the ground that the right was limited to prosecutions strictly criminal.³

§ 48. Yet there are many cases in which the character of a person is one of the points at issue ; and in such cases evidence as to character is not only relevant but of direct importance. Is a master or agent, for instance, charged with *culpa in eligendo*? In such case the bad general reputation of the employee is the very point the plaintiff has to establish.⁴ Is the general conduct of a party at issue? Then general reputation (as distinguished from proof of particular acts) is admissible to show, not that particular things were done or not done by the party, but that his general conduct was or was not as alleged.⁵

§ 49. Character, in the sense in which the term is here used, means the estimate attached to the individual by the community, not the private opinion held as to such individual by the witness. Character, therefore, is to be

Where character is at issue, there general reputation may be proved.

Character is convertible with reputation.

246; *Bennett v. Hyde*, 6 Conn. 24; *Adams v. Lawson*, 17 Grat. 250; *Shroyer v. Miller*, 3 W. Va. 159; *Byrket v. Monohan*, 7 Blackf. 83; *Howell v. Howell*, 10 Ired. 82; *Sample v. Wynn*, Busbee, 319; *Barton v. March*, 6 Jones, L. 409; *Scott v. Peebles*, 2 Sm. & M. 546.

¹ *Matthews v. Huntley*, 9 N. H. 146; *Stow v. Converse*, 3 Conn. 325; *Houghtaling v. Kilderhouse*, 1 N. Y. 530; aff. *S. C.* 2 Barb. 149. Though see *Harding v. Brooks*, 5 Pick. 244; *Byrket v. Monohan*, 7 Blackf. 83. See, for other cases, *infra*, § 50.

² See more fully, *infra*, § 50; *Steinman v. McWilliams*, 6 Penn. St. 170.

³ *Atty. Gen. v. Bowman*, 2 B. & P. 532, n. a.

⁴ See *Wharton on Ag.* § 277; *Lee v. Detroit*, 62 Mo. 565; *Huntington R. R. v. Decker*, 3 Weekly Notes, 120. Otherwise when *culpa in eligendo* is not averred. *Robinson v. R. R.* 7 Gray, 92; *Jacobs v. Duke*, 1 E. D. Smith, 271. See *infra*, § 55.

⁵ *Fountain v. Boodle*, 3 Q. B. 5; *Humphrey v. Humphrey*, 7 Conn. 116; *Anderson v. Long*, 10 S. & R. 55; *Atkinson v. Graham*, 5 Watts, 411; *Frazier v. R. R.* 38 Penn. St. 104.

regarded as convertible with "reputation,"¹ or the general credit which a man has obtained in public opinion. A witness, therefore, who is called to speak to character, — unlike a master who is asked for the character of his servant, — cannot give the result of his own personal experience and observation, or express his own opinion, but, in strict law, he must confine himself to evidence of mere general repute.² In view of the fact that "the best character is generally that which is the least talked about," the courts have found it necessary to permit witnesses to give negative evidence on the subject, and to state that "they never heard anything *against* the character of the person on whose behalf they have been called."³ The reputation to be established is that which would make it likely or unlikely that the party would do the controverted acts.⁴ When character is attacked it may be defended by rebutting proof as to general reputation, but not by proof of particular facts tending to show bad character.⁵ Thus, where a party is charged in a libel, not with doing particular acts, but general dishonesty or incapacity, then, in a suit on such libel, it is admissible for the plaintiff to prove general honesty and capacity.⁶

§ 50. It would be manifestly improper to permit a party suing for damages to put in evidence, as reason why he should have heavy damages, that his character is good. First the law assumes all characters to be good, and there is no use in proving that which is thus assumed; secondly, to make good character the basis of recovery would be equivalent to saying that a person with a bad character

¹ *Infra*, § 564; *Knode v. Williamson*, 17 Wall. 586; *Wetherbee v. Norris*, 103 Mass. 566.

² *Taylor's Ev.* § 325 A.

³ *Cockburn, C. J., L. & Cave C. C.* 536; 10 Cox, 34; *R. v. Turner*, 6 How. St. Tr. 613; *Gandolfo v. State*, 11 Oh. (N. S.) 114. See fully, *infra*, § 564.

⁴ *R. v. Clarke*, 2 Stark. 241; *R. v. Stannard*, 7 C. & P. 673; *Com. v. Hardy*, 2 Mass. 317; *Boynton v. Kellogg*, 3 Mass. 189; *Com. v. Webster*, 5 Cush. 324; *Andrews v. Vanduzer*, 11

Johnson, 38; *Douglass v. Tousey*, 2 Wend. 352; *Frazier v. R. R.* 38 Penn. St. 104; *Hopps v. People*, 31 Ill. 385; *People v. Garbutt*, 17 Mich. 9; *Sawyer v. Eifert*, 2 Nott & M. 511; *Davis v. State*, 10 Ga. 101; *State v. Touney*, 27 Mo. 12; *People v. Fair*, 43 Cal. 137.

⁵ See *supra*, § 49; *R. v. Rowton*, Leigh & C. 520; *S. C.* 10 Cox C. C. 25; *Com. v. Sackett*, 22 Pick. 394; *Com. v. Webster*, 5 Cush. 295; *People v. White*, 14 Wend. 111.

⁶ *King v. Waring*, 5 Esp. 14; *Fountain v. Boodle*, 3 Q. B. 5.

can be injured with impunity; thirdly, a collateral issue would be provoked which would bear hard upon many deserving cases. For these and other reasons, the courts have refused to permit such evidence to be put in. Thus, in an action for the seduction of a daughter, the good character of the girl cannot, as will be presently seen, be put in evidence as part of the plaintiff's case.¹ Nor will the plaintiff in an action for slander for charging theft be permitted to prove, as part of his case, his character for honesty.² But it is otherwise where the defendant sets up a defence by which the plaintiff's character is even indirectly impugned; or when the general issue is pleaded, in which case the plaintiff may prove his general good character in order to increase damages.³

§ 51. It has been argued that in actions of seduction the good character of a third person is one of the grounds on which a plaintiff in a suit claims damages; and if so, the plaintiff, it is said, is entitled to put such good character in evidence. It is clear that a father, for instance, suing for damages for his daughter's seduction, may prove the value of her services, though this incidentally involve the question of character;⁴ and the same reasoning is used as to an action by a husband, for damages for adultery with his wife.⁵ But in neither of these cases can the plaintiff, as a matter of evidence in chief, prove directly the prior good character of the seduced person as a ground for recovery.⁶ On the other hand, to mitigate the offence, the defendant has been held entitled to put in evidence not merely the prior general bad character, but particular prior acts of indiscretion on the part of

In suits for seduction evidence of previous character of person seduced is admissible.

¹ *Bamfield v. Massey*, 1 Camp. 460; *Dodd v. Norris*, 3 Camp. 519.

² *Abbott, C. J.*, in *Cornwall v. Richardson*, R. & M. 307. See *supra*, § 47.

³ *Bate v. Hill*, 1 C. & P. 100; *R. v. Clarke*, 2 Stark. R. 241; *Brown v. Goodwin*, Ir. Cir. Rep. 61; cited *Taylor's Ev.* § 335; *Romayne v. Duane*, 3 Wash. C. C. 246; *Bennett v. Hyde*, 6 Conn. 24; *Sample v. Wynn*, Busbee (N. C.), 319; *Burton v. March*, 6 Jones, L. 409; *Holly v. Burgess*, 9 Ala. 728; *Steinman v. McWilliams*, 6 Penn. St. 170; *Shroyer v. Miller*, 3

W. Va. 158. See, for other cases, *supra*, § 47; *Townsend on Libel*, § 387.

⁴ See *Andrews v. Askey*, 8 C. & P. 7; *Dodd v. Norris*, 3 Camp. 519; *Elsam v. Faucett*, 2 Esp. 562; *Terry v. Hutchinson*, 9 B. & S. 487; *Carpenter v. Wall*, 11 A. & E. 803; *Grinnell v. Wells*, 7 M. & G. 1033.

⁵ *Buller N. P.* 27.

⁶ *Bamfield v. Massey*, 1 Camp. 460; *Dodd v. Norris*, 3 Camp. 519; *Pratt v. Andrews*, 4 N. Y. 493; *Wilson v. Sproul*, 3 Pen. & Watts, 49.

the person seduced.¹ In such case the plaintiff may prove the general good reputation of the seduced person in rebuttal.²

§ 52. It does not bar an action for breach of promise of marriage that the plaintiff has a bad character, for promises must be kept to persons of bad character as well as to persons of good character. But when a plaintiff claims that his character has been damaged, and his feelings crushed, by such breach of promise, then, in mitigation of damages, it may be shown that he had no character to be hurt by the breach,³ and no feelings that would be particularly shocked.⁴ With regard to immorality we may go a step further. If a man "is inveigled into an engagement by a harlot, he is a victim of a sheer, bald fraud." In such case he can, as part of his defence, put in evidence the bad character of the woman, showing that he was ignorant of such bad character at the time of the engagement.⁵ Whatever would show that the party suing was not in a condition to perform the contract, is admissible in defence,⁶

¹ *Verry v. Watkins*, 7 C. & P. 308.

² *Bate v. Hill*, 1 C. & P. 100. See qualifications stated by Bronson, C. J., in *Pratt v. Andrews*, 4 N. Y. 495.

³ *Foulkes v. Sellway*, 3 Esp. 236; *Boyton v. Kellogg*, 3 Mass. 189.

⁴ *Leeds v. Cook*, 4 Esp. 256.

⁵ *Van Storch v. Griffin*, 67 Penn. St. 504.

⁶ "In *Baddely v. Mortlock*, 1 Holt's Nisi Prius Rep. 151 (1816), 3 E. C. L. R. 57, where a man brought an action against a woman for breach of promise, the latter had heard some charges against him involving pecuniary fraud and perjury, and on not receiving any satisfactory explanation, broke off the match. Gibbs, Ch. J., held, if the charges were true, she was not bound to perform the contract, but that unless they were clearly proven, the existence of the rumor affected only the damages. See, also, the reporter's note to this case, citing *Foulkes v. Sellway*, 3 Espinasse, 336; *Leeds v. Cooke*, 4 Esp. 256; and as to circumstances which justify non-performance of this contract generally, Pothier, *Traité du*

Contrat de Mariage, part 2, chap. 1, art. 7. In *Irving v. Greenwood*, 1 Car. & Payne, 350 (1824), (11 E. C. L. R. 412), it was held that if the promise was broken by the defendant because he found the plaintiff to be a loose and immodest woman, it went in bar of the action, unless he was aware of the circumstances. See note, also, to this case. See, also, *Wharton v. Lewis*, 1 C. & P. 529 (11 E. C. L. R. 459), where the same rule is extended to "misrepresentation or wilful suppression of the real state of the plaintiff's family." In *Bench v. Merrick*, 1 Car. & Kir. (47 E. C. L. R.) 463 (1844), the rule laid down by the court in the principal case was adopted, where the promise had been made in ignorance that the woman had had an illegitimate child ten years before, though her conduct since might have been perfectly correct. See, also, *Young v. Murphy*, 3 Bing. N. C. 54 (32 E. C. L. R. 38); *Horam v. Humphreys*, Loft's Rep. 80." Note to *S. C.* in 1 Weekly Notes, 466.

§ 53. Much vexed has been the question whether, when a party sues for damages sustained by the defendant's libel or slander, the defendant, in mitigation of damage, may put in evidence the plaintiff's general bad character, opening him to suspicion in the very relations which the defamation in question covered. The inclination of opinion is in the affirmative.¹ "The plaintiff's general character is in issue in this action, and the defendant may show that the plaintiff's reputation has sustained no injury, because he had no reputation to lose."² But the defendant ought not to be permitted to introduce such evidence, without in some way, by plea or otherwise, giving the plaintiff notice.³

When plaintiff sues for slander or libel, defendant may put plaintiff's general bad character in issue.

§ 54. Although in an action for malicious prosecution the plaintiff's bad character, as has been stated, cannot be put in evidence as proof of probable cause, such evidence may be received in order to mitigate damages.⁴

So in malicious prosecution.

§ 55. Good character being presumed, evidence to support it will not be received until it is assailed or until it is put directly in issue.⁵

Burden on party assailing character.

¹ Folkard on Slander, 541; 2 Starkie's Evid. 641, citing unreported decisions by Lord Denman, Parke, B., Lord Tenterden, and Colman, J.; Leicester v. Walter, 2 Camp. 251; Richards v. Richards, 2 M. & R. 587; Newssam v. Carr, 2 Stark. R. 70; ——— v. Moor, 1 M. & Sel. 281, Ciley v. Jenness, 2 N. Hamp. 87; Foot v. Tracy, 1 Johns. 46; Paddock v. Salisbury, 2 Cow. 811; Hamer v. McFarlin, 4 Denio, 509; Wilson v. Noonan, 27 Wis. 598; Whitaker v. Freeman, 1 Dev. L. 270; Bryan v. Gurr, 27 Ga. 378; Scott v. McKinnish, 15 Ala. 662; Pope v. Welsh, 18 Ala. 631; Fuller v. Dean, 31 Ala. 651. *Contra*, Jones v. Stevens, 11 Price, 257; Cornwall v. Richardson, R. & M. 305; Jackson v. Stetson, 15 Mass. 48; Alderman v. French, 1 Pick. 1; Walcott v. Hall, 6 Mass. 514. See Ross v. Lapham, 14 Mass. 275; Bailey v. Hyde, 3 Conn. 403; Bennett v. Hyde, 6 Conn. 24; Douglass v. Tousey, 2 Wend. 352.

See, generally, Maynard v. Beardsley 7 Wend. 550; Winebiddle v. Porterfield, 9 Penn. St. 137; Young v. Bennett, 4 Seam. 43; B. v. J. 22 Wis. 372.

² Davis, J., Whitney v. Janeville Gazette, 5 Bissell, 330.

³ Townsend on Slander, § 406, citing Anon. 8 How. Pr. 131.

⁴ Rodriguez v. Tadmire, 2 Esp. 72; Downing v. Butcher, 2 M. & R. 374; Bacon v. Towne, 1 Cush. 217; Goodrich v. Warren, 21 Conn. 182; Winebiddle v. Porterfield, 9 Penn. St. 137; Gwin v. Bradley, 3 Bibb, 192; Israel v. Brooks, 23 Ill. 575; Bostick v. Rutherford, 4 Hawks, 83; Beal v. Robeson, 8 Ired. 296; Martin v. Hardesty, 29 Ala. 758; Field on Damages, § 688. Though see Fitzgibbon v. Brown, 43 Me. 169. See *supra*, § 47. *Aliter*, when attack on character is disclaimed. Smith v. Hyndman, 10 Cush. 551.

⁵ Ketland v. Bissett, 1 Wash. C. C. 144; Bruce v. Priest, 5 Allen, 100;

§ 56. Particular facts, as going to make up a reputation for either good or bad character, cannot ordinarily be put in evidence.¹ At the same time, in an action based on *culpa in eligendo*, against a principal, evidence may be given of particular facts from which the principal was bound to have inferred the agent's incompetency.²

Particular facts cannot be put in evidence.

Pratt v. Andrews, 4 Comst. 493; Cochran v. Toher, 14 Minn. 385; Goldsmith v. Picard, 27 Ala. 142. *Infra*, 562-8.

¹ R. v. Rowton, L. & C. 320; Com. v. Sackett, 22 Pick. 394; Com. v. Webster, 8 Cush. 314; People v. White, 14 Wend. 111; McCarty v. People, 51 Ill. 231; Keener v. State, 18 Ga. 194; though see State v. Jerome, 33 Conn. 265.

² Huntington R. R. v. Decker, 3 Weekly Notes, 120 (apparently modifying Frazier v. R. R. 38 Penn. St. 103); Pittsburg R. R. v. Ruby, 38 Ind. 312. See Robinson v. R. R. 7 Gray, 92, and *supra*, § 48.

"Where a party undertakes to show that his reputation is good, or that the reputation of the other party or a witness is bad, he cannot put in evidence of particular facts to prove the general reputation he is endeavoring to establish. And to meet evidence of general reputation, the opposing party may put in evidence to the contrary of a like general character. But he cannot prove particular facts, for the reason that a particular fact does not necessarily establish a general reputation, or fairly meet the issue presented, and may also raise collateral issues; and for the further reason that while a party is presumed always to be ready to defend his general reputation, he is not expected to be prepared to meet a distinct and specific charge." Peterson v. Morgan, 116 Mass. 350. . . .

"In Commonwealth v. Hardy, 2

Mass. 303, 318, it was said by Chief Justice Parsons: "It is not competent for the prosecutor to go into this inquiry, until the defendant has voluntarily put his character in issue, and in such case there can be no examination as to particular facts." See Commonwealth v. Sackett, 22 Pick. 394; Commonwealth v. Webster, 3 Cush. 295.

"It is true that upon cross-examination of a witness testifying to general reputation, questions may be put to show the sources of his information, and particular facts may be called to the witness's attention, and he may be asked if he ever heard of them; but this is allowed, not for the purpose of establishing the truth of these facts, but to test the credibility of the witness, and to ascertain what weight or value is to be given to his testimony. Leonard v. Allen, 11 Cush. 241; Rex v. Martin, 6 C. & P. 562. So in actions for slander, evidence of general bad character of the plaintiff may be put in evidence in mitigation of damages; and where the plaintiff alleges that the defendant has slandered him in a particular respect, as for thieving, the defendant may put in evidence for the same purpose that the plaintiff's general reputation in that respect is also bad. Clark v. Brown, 116 Mass. 504. But we are not aware of any case where the defendant upon that issue has been allowed to prove a particular act of theft." Commonwealth v. O'Brien, 119 Mass. 345, 346, 347, Endicott, J.

CHAPTER III.

PRIMARINESS AS TO DOCUMENTS.

I. GENERAL RULES.

Secondary evidence of documents is inadmissible, § 60.

Rule applies to evidential as well as to dispositive documents, § 61.

Record facts cannot be proved by parol, § 63.

Otherwise as to incidents collateral to records, § 64.

Of administrative records parol evidence is admissible, § 65.

Probate of will cannot be proved by parol, § 66.

Administration must be proved by record, § 67.

Parol evidence not admissible on cross-examination, § 68.

Statutory designation of writings not necessarily exclusive, § 69.

Primary means immediate, § 70.

General test is not authority but immediateness, § 71.

No primary testimony is rejected because of faintness, § 72.

Written secondary evidence inadmissible, § 73.

Counterparts are receivable singly, but not so duplicates, § 74.

Brokers' books are primary in respect to bought and sold notes, § 75.

Of telegrams original must be produced, § 76.

II. EXCEPTIONS TO RULE.

Rule does not apply where parol evidence is as primary as written, § 77.

So where the party charged admits the contents of the document, § 79.

Summaries of voluminous documents can be received, § 80.

So of parol evidence of things fleeting and unproducible, § 81.

So of documents which cannot be brought into court, § 82.

Statute may require marriage to be proved by record, § 83.

By private international law marriage may be proved by parol, § 84.

In charges of penal marriage strict proof is required, § 85.

III. DIFFERENT KIND OF COPIES.

Classification, § 89.

Secondary evidence of documents admits of degrees, § 90.

Photographic copies are secondary, § 91.

All printed impressions are of same grade, § 92.

Press copies are secondary, § 93.

Examined copies must be compared, § 94.

Exemplifications of record admissible as primary, § 95.

In the United States made so by statute, § 96.

Statute does not exclude other proofs, § 98.

Only extends to court of record, § 99.

Statute must be strictly followed, § 100.

Office copy admitted when authorized by law, § 104.

Independently of statute, records may be received, § 105.

Original records receivable in same court, § 106.

Office copies admissible in same state, § 107.

So of copies of records generally, § 108.

Seal of court essential to copy, § 109.

Exemplification of foreign records may be proved by seal or parol, § 110.

Of deeds, registry is admissible, § 111.

Ancient registries admissible without proof, § 113.

Certified copy of official register receivable, § 114.

Exemplification of recorded deeds admissible, § 115.

When deeds are recorded in other states exemplifications must be under act of Congress, § 118.

Exemplifications of foreign wills or grants provable by certificate, § 119.

Certificates inadmissible by common law; otherwise by statute, § 120.

Notaries' certificates admissible, § 123.

Searches of deeds admissible, § 126.

Copies of public documents receivable, § 127.

IV. SECONDARY EVIDENCE MAY BE RECEIVED WHEN PRIMARY IS UNPRODUCIBLE.

Lost or destroyed documents may be proved by parol, § 129.

So of papers out of power of party to produce, § 130.

Accidental destruction of paper does not forfeit this right, § 132.

Copies of unproducible documents receivable, § 133.

So may abstracts and summaries, § 134.

So as to records, § 135.

So as to depositions taken in same case, § 137.

So as to wills, § 138.

Witness of lost document must be sufficiently acquainted with original, § 140.

Court must be satisfied that original is non-producible and would be evidence if produced, § 141.

Loss may be inferentially proved, § 142.

Or by admission of opponent, § 143.

Probable custodian must be inquired of, § 144.

Search in proper places must be proved, § 147.

Degree of search to be proportioned to importance of document, § 148.

Peculiar stringency in case of negotiable paper, § 149.

Third person in whose hands is document must be subpoenaed to produce, § 150.

Party may prove loss by affidavit, § 151.

V. SO WHEN DOCUMENT IS IN HANDS OF OPPOSITE PARTY.

Notice to produce is necessary when document is in hands of opposite party, § 152.

After refusal secondary evidence can be given, § 153.

Notice must be timely, § 155.

Notice to produce does not make a paper evidence, § 156.

Party refusing to produce is bound by his refusal, § 157.

After paper is produced opposite side cannot put in secondary proof, § 158.

Notice not necessary for document on which suit is brought, § 159.

Nor where party is charged with fraudulently obtaining or withholding document, § 160.

Nor of documents admitted to be lost, § 161.

Nor of notice to produce, § 162.

Collateral facts as to instrument may be proved without notice, § 163.

I. GENERAL RULE.

§ 60. WHENEVER an original document can be brought into court, secondary evidence of its contents is, as a rule, inadmissible. In some instances this exclusion may be based on a statutory limitation. In others it may be sustained on the ground that when the parties to a contract agree to embody the contract in certain words on a certain paper, the contract can, in good faith, be evidenced in no other way. But whether the document, whose contents are in controversy, be

Secondary
evidence
inadmissible.

one which a statute requires to be in writing; or whether it be a contract put in writing by consent of the parties; or whether, belonging to neither of these classes, it be one whose meaning it is important for the purposes of justice accurately to collect,—the policy of the law, independent of other reasons, requires that its original, if practicable, should be produced. For, (1.) *lex scripta manet*, while memory as to words is treacherous; and even though not memory but a written copy be offered, such copy has between it and the original the possibility of mistake or of falsification. Then, (2.) if a party be permitted to hold back the original, when he could produce it, and substitute for it a secondary proof, a door would be opened to fraud. And, (3.) unless such a rule be inexorably applied, an end would be put to that accurate and thorough presentation of facts which is essential to the administration of justice. If no evidence is to be rejected because it is secondary, a single witness would be sufficient to swear, either primarily or secondarily, either by first hand or second hand impressions, to a whole case, documentary and oral; the testimony of a witness, in such a case, would be a mere conclusion of law, derived from his own notions of facts, with this peculiarity, that the law would be made by himself for the occasion; and the functions of both judge and jury would be dispensed with. If any evidence is to be rejected because it is secondary, then it is best to put the line where it is most intelligible; where it is most likely to secure care and diligence in the preparation of a case, and accuracy in the presentation of that case to the court; where the intent of parties in executing a writing will be best promoted; and where fraud, in the substitution of the spurious for the genuine, will be most effectually excluded. So far as concerns documentary evidence, these ends are best met by the rule above stated, which has been adopted with singular unanimity by all jurisprudences, that secondary evidence cannot be received of a document whose original could be brought into court.¹

¹ Among the cases in which this rule is vindicated may be found the following: *Brewster v. Sewell*, 3 B. & A. 302; *Cotterill v. Hobby*, 4 B. & C. 465; *Rowe v. Brenton*, 8 B. & C. 737; *Strother v. Barr*, 5 Bing. 151; *Vincent v. Cole*, M. & M. 258; *Twyman v. Knowles*, 13 C. B. 224; *Siordet v. Knezinski*, 17 C. B. 251; *Cory v. Davis*, 14 C. B. (N. S.) 370; *Taylor v. Riggs*, 1 Pet. 591; *Dwyer v. Dunbar*, 5 Wall. 318; *Comstock v. Carnley*,

§ 61. It makes no difference in this respect, whether the document, whose contents are to be proved, is dispositive, *i. e.* one disposing of rights, — or evidential, *i. e.* one going to prove a relevant fact in dispute. In the latter case as well as the former, the writing must be produced if practicable, wherever it is necessary to prove the particular act which the writing embodies. It becomes relevant, for instance, to prove a military desertion, of which an official registry is kept by authority of law. In such case, if such registry is obtainable, the desertion cannot be proved by parol, or even by the soldier's letters.¹ Again: when the question is whether a person was rated for the relief of the poor, this must be determined by the rate-book, and not by the collector's oral answer.² A witness cannot even be asked whether certain resolutions were published in a newspaper; ³ nor whether his name was written in a certain book,⁴ unless the non-production of the newspaper or book be accounted for.⁵ In other words, with certain exceptions to be hereafter stated,⁶ when a relevant fact consists of the substance of a document, the document itself is the proper evidence of such fact. Until the absence of the document is satisfactorily explained, the fact cannot be proved by parol.⁷ As documents in

4 Blatch. 58; *Morton v. White*, 16 Me. 53; *Greeley v. Quimby*, 22 N. H. 335; *Putnam v. Goodall*, 3 N. H. 419; *Wells v. Man. Co.* 48 N. H. 491; *Com. v. Kinison*, 4 Mass. 646; *Bassett v. Marshall*, 9 Mass. 312; *Com. v. James*, 1 Pick. 375; *Terrell v. Colebrook*, 35 Conn. 188; *Gimball v. Hufford*, 46 Ind. 125; *McCombe v. R. R.* 67 N. C. 193; *Fitzgerald v. Adams*, 9 Ga. 471; *Newsom v. Jackson*, 26 Ga. 241; *Cloud v. Patterson*, 1 Stew. Ala. 394; *Isabella v. Pecot*, 2 La. An. 387; *Hall v. Acklen*, 9 La. An. 219; *Pendery v. Ins. Co.* 21 La. An. 410; *Ritchie v. Kinney*, 46 Mo. 298; *Chicago v. Magraw*, 75 Ill. 566; *Conger v. Converse*, 9 Iowa, 554; *Steele v. Etheridge*, 15 Minn. 501; *Bemis v. Becker*, 1 Kan. 226; *Bovee v. McLean*, 24 Wis. 223; *Cotton v. Campbell*, 3 Tex. 493; *Holliday v. Harvey*, 39 Tex. 670. And so

when a document is voluntarily destroyed by the party. See *infra*, §§ 1265–70.

¹ *Terrell v. Colebrook*, 35 Conn. 188. *Infra*, § 65.

² *R. v. Coppull*, 2 East, 25; *Justice v. Elstob*, 1 F. & F. 256; *R. v. Fitzpaine*, 2 Q. B. 494.

³ *R. v. O'Connell*, Arm. & T. 103.

⁴ *R. v. Coppull*, 2 East, 25.

⁵ See *infra*, § 70.

⁶ See *infra*, § 77.

⁷ Mr. Taylor (*Ev.* § 373) illustrates the position in the text by cases “where the question at issue was simply what amount of rent was reserved by the landlord. *R. v. Merthyr Tidvil*, 1 B. & Ad. 29; *Angustien v. Challis*, 1 Ex. R. 280. In this case Alderson, B., observes: ‘You may prove by parol the relation of landlord and tenant, but without the

this sense are to be reckoned letters, books, notes, deeds, contracts, accounts, records, journals, wills, &c.¹

lease you cannot tell whether any rent was due.' So the writing must be produced to show who was the actual party to whom a demise had been made; *R. v. Rawden*, 8 B. & C. 708; 3 M. & R. 426, *S. C.*; or under whom the tenant came into possession; *Doe v. Harvey*, 8 Bing. 239; 1 M. & Sc. 374, *S. C.* In an action for the price of labor performed, where it appeared that the work was commenced under an agreement in writing, but the plaintiff's claim was for extra work, it has been several times held that, in the absence of positive proof that the work in question was entirely separate from that included in the agreement, and was in fact done under a distinct order, the plaintiff was bound to produce the original document, since it might furnish evidence not only that the items sought to be recovered were not included

therein, but also of the rate of remuneration upon which the parties had agreed. *Vincent v. Cole*, M. & M. 257, per Ld. Tenterden; 3 C. & P. 481, *S. C.*; *Buxton v. Cornish*, 1 Dowl. & L. 585; 12 M. & W. 426, *S. C.*; *Jones v. Howell*, 4 Dowl. 176; *Holbard v. Stephens*, 5 Jur. 71, Bail C., per Williams, J.; *Parton v. Cole*, 6 Jur., Bail C. 370, per Patteson, J. See *Reid v. Batte*, M. & M. 413; *Edie v. Kingsford*, 14 Com. B. 759. See, also, *Hawkins v. Warre*, 3 B. & C. 697, where Abbott, C. J., draws the distinction between papers signed by the parties or their agents, and those which are unsigned.

"In *Whitford v. Tutin*, 10 Bing. 395; 4 M. & Sc. 166, *S. C.*, the plaintiff had been employed as secretary to the committee of a charitable society, pursuant to a resolution entered in the book of the committee,

¹ *Wilson v. Young*, 2 Cranch C. C. 33; *De Tastet v. Cronsillat*, 2 Wash. C. C. 132; *Sebree v. Dorr*, 9 Wheat. 558; *U. S. v. Boyd*, 5 How. 29; *Skowhegan Bank v. Cutler*, 49 Me. 315; *Gage v. Wilson*, 17 Me. 378; *March v. Garland*, 20 Me. 21; *Whitney v. Balkam*, 24 Me. 406; *Gale v. Currier*, 4 N. H. 169; *Morrill v. Otis*, 12 N. H. 466; *Brown v. Jewett*, 18 N. H. 230; *Hunt v. Rylance*, 11 Cush. 117; *New Haven Bk. v. Mitchell*, 15 Conn. 206; *Dygert v. Coppernall*, 13 Johns. R. 210; *Cole v. Jessup*, 10 N. Y. 96; *Bank v. Woods*, 28 N. Y. 545; *Smith v. Axtell*, 1 N. J. Eq. 494; *Vanhorn v. Frick*, 3 Serg. & R. 278; *Bryant v. Stilwell*, 21 Penn. St. 314; *Eddy v. Peterson*, 22 Ill. 535; *Wilt v. Bird*, 7 Blackf. 258; *Patterson v. Doe*, 8 Blackf. 237; *Williams v. Jones*, 12 Ind. 561; *Turner v. Singleton*, 2 A.

K. Marsh. 15; *Smith v. Dudley*, 1 Litt. (Ky.) 66; *Smith v. Phillips*, 25 Mo. 555; *State v. Rosenfeld*, 35 Mo. 472; *Thompson v. Richards*, 11 Mich. 172; *Angell v. Rosenburg*, 12 Mich. 24; *Conway v. Bank*, 13 Ark. 48; *Graham v. Hamilton*, 3 Ired. L. 381; *Davidson v. Norment*, 5 Ired. L. 555; *Felton v. McDonald*, 4 Dev. (N. C.) L. 406; *Gwynn v. Setzer*, 3 Jones (N. C.) L. 382; *Harris v. Eubanks*, 1 Spears (S. C.), 183; *Miller v. Cotton*, 5 Ga. 341; *Fitzgerald v. Adams*, 9 Ga. 471; *Raines v. Perryman*, 29 Ga. 529; *Mordecai v. Beal*, 8 Port. (Ala.) 529; *Hooks v. Smith*, 18 Ala. 338; *Kidd v. Cromwell*, 17 Ala. 618; *Dumas v. Hunter*, 30 Ala. 75; *Gaines v. Page*, 15 La. An. 108; *Dikes v. Miller*, 21 Tex. 417; *Poole v. Gerrard*, 9 Cal. 593.

§ 62. To exclude, however, parol evidence on this ground, the objection must be taken at the time. Thus in a suit on an alleged debt, if the plaintiff can establish a *prima facie* case, without betraying the existence of a written contract relating to the subject matter of the action, he cannot be precluded from recovering by the defendant subsequently giving evidence that the agreement was reduced into writing; but the defendant, if he means to rely on a written contract, must produce it as part of his evidence.¹ So it has been ruled in an action of ejectment, that the plaintiff could not be defeated by one of his witnesses proving on cross-examination, that an agreement, which he only knew *related in some way to the land in question*, was seen on that morning in the hands of the plaintiff's attorney, and was produced at a former trial between the same parties; and the court held that, in order to exclude parol evidence of the tenancy, it should appear that the agreement was between the same parties, and was binding at the time of the second trial; neither of which facts was proved.² But when a party discovers and dis-

of which, during his service, he had had the care. The society being afterwards dissolved, the plaintiff sued some of the members of the committee for his salary, and the court held that he was bound to produce the book under which he was engaged; for though he was no party to the original resolution, which was entered into before his appointment as secretary, yet by accepting the situation and the benefit attached to it, he must be taken to have adopted the terms contained in the resolution, and, consequently, was bound to produce the book to show what those terms really were. Whether, in an action on the case for an injury done to the plaintiff's reversion, his interest as a reversioner may be proved by the parol testimony of the tenant, when it appears that the premises are occupied under a written agreement, may admit of some doubt. In one case it was held that the agreement must be produced; *Cotterill v. Hobby*, 4 B. & C. 465;

but in a later case, where nominal damages only were recovered, and independent proof was given of the premises having been devised to the plaintiff, the judges of the court of common pleas were equally divided upon the question whether a nonsuit should be entered, the plaintiff having omitted to produce the written agreement between the occupier and himself. *Strother v. Barr*, 5 Bing. 136; *Best, C. J.*, and *Burrough, J.*, in favor of nonsuit; *Park and Gaselee, JJ., cont.*; 2 M. & P. 207, *S. C.* Taylor's Ev. § 373-4.

¹ Taylor's Ev. § 375; *Magnay v. Knight*, 1 M. & Gr. 944; 2 Scott N. R. 64, *S. C.*; *Stephens v. Pinney*, 8 Taunt. 327; 2 Moore, 349, *S. C.*; *Marston v. Deane*, 7 C. & P. 13; *Fry v. Chapman*, 5 Dowl. 265; *R. v. Padstow*, 4 B. & Ad. 208; 1 N. & M. 9, *S. C.*; *Reed v. Deere*, 7 B. & C. 261, 266.

² *Doe v. Morris*, 12 East, 237.

closes for the first time on trial that there is a writing embodying that which he proposes to prove by parol, the rule holds good. It is his business to duly prepare himself for trial, and to probe the nature of his testimony in advance.¹

§ 63. That which could be proved by record, cannot ordinarily be proved by parol.² Thus the filing of a paper must be proved by the certificate of the clerk,³ the discontinuance of an action must be proved by the record,⁴ a pardon must be proved by the warrant;⁵ a divorce must be proved by the decree.⁶ So the record is primary proof of prize proceedings in admiralty;⁷ of an order of court *nunc pro tunc*;⁸ of a removal of goods under an execution;⁹ of a sale under order of court, or by sheriff;¹⁰ of a tax sale;¹¹ of an agreement of

Record
facts can-
not be
proved by
parol.

¹ Scarborough v. Reynolds, 12 Ala. 252; Hoitt v. Moulton, 21 N. H. 586.

² Melver v. Moore, 1 Cranch C. C. 90; Gleason v. Florida, 9 Wall. 779; Moody v. Moody, 11 Me. 247; Winsor v. Clark, 39 Me. 428; Chase v. Savage, 55 Me. 543; Pendexter v. Carleton, 16 N. H. 482; Smith v. Kirby, 10 Mete. 150; Fleming v. Clark, 12 Allen, 191; Wayland v. Ware, 109 Mass. 248; Arnold v. Smith, 5 Day, 150; Brush v. Taggart, 7 Johns. R. 19; Rathbun v. Ross, 46 Barb. 127; Real, in re, 55 Barb. 186; Baskin v. Sechrist, 6 Penn. St. 151; Stebbins v. Cooper, 4 Denio, 191; Duvall v. Peach, 1 Gill (Md.), 172; Myers v. Smith, 27 Md. 91; Glascock v. Nave, 15 Ind. 457; Reilly v. Cavanagh, 29 Ind. 435; State v. Thompson, 19 Iowa, 299; Flournoy v. Newton, 8 Ga. 306; Rutherford v. Crawford, 53 Ga. 138; Kennedy v. Reynolds, 27 Ala. 364; State v. Longineau, 6 La. An. 700; State v. Smith, 12 La. An. 349; Flynn v. Ins. Co. 17 La. An. 135; Brown v. Wright, 4 Yerg. 57; Bogart v. Green, 8 Mo. 115; State v. Edwards, 19 Mo. 674.

³ Peterson v. Taylor, 15 Ga. 483.

⁴ Sheldon v. Frink, 12 Pick. 568.

⁵ Spalding v. Saxton, 6 Watts, 338.

⁶ Tice v. Reeves, 30 N. J. L. 314.

⁷ Massonier v. Ins. Co. 1 Nott & M. 155.

⁸ Ludlow v. Johnston, 3 Ohio, 553.

⁹ Wynne v. Aubuchon, 23 Mo. 30.

¹⁰ Dane v. Mallory, 16 Barb. 46; Phillips v. Costley, 40 Ala. 486.

¹¹ "It is a rule well established by authority, that when one claims to hold another's property under statutory proceedings, as under a sale for taxes, he must show that every material provision designed for the security of the persons taxed, for their protection, has been substantially complied with, otherwise the claim will fail. In fact the rule is generally laid down with much more strictness. Bloom v. Burdick, 1 Hill, 131; Sharp v. Spier, 4 Hill, 76; Doughty v. Hope, 3 Denio, 594; Whitney v. Thomas, 23 N. Y. 281; Van Rensselaer v. Witbeck, 3 Seld. 517; People v. Chenango Sup'rs, 1 Kern. 563; Thacher v. Powell, 6 Wheat. 119. The cases of Swift v. The City of Poughkeepsie (37 N. Y. 513), and Barhyte v. Shepherd (35 N. Y. 251), have not changed this rule." Peckham, J., Cruger v. Dougherty, 43 N. Y. 121.

reference;¹ of a binding over for a crime;² of conviction of a crime;³ of a bastardy order;⁴ of the desertion of a soldier, of which there is an official record;⁵ of the action of a town meeting as to which a record is required to be kept;⁶ of the time of the terms of a court;⁷ of a bankrupt discharge;⁸ of the institution of suits;⁹ of the character of the pleadings and docket proceedings.¹⁰

§ 64. But as with contracts, so with records, collateral incidents, not of record, may be proved by parol.¹¹ Thus Incidents collateral to records may be proved by parol. parol evidence has been held admissible, to prove that two records relate to the same cause of action,¹² though in such cases the records must be first put in evidence;¹³ to show the cause of action of a judgment when not set forth by

¹ *Grimes v. Grimes*, 1 Dane, 234.

² *Smith v. Smith*, 43 N. H. 536.

³ *People v. Reinhardt*, 39 Cal. 449; *Clements v. Brooks*, 13 N. H. 92; *Com. v. Quinn*, 5 Gray, 478; *Newcomb v. Griswold*, 24 N. Y. 298; *Peck v. Yorks*, 47 Barb. 131; *Johnson v. State*, 48 Ga. 116. See, as qualifying this, *infra*, §§ 77, 541-42; and see § 64.

⁴ *Tyrrel v. Woodbridge*, 27 N. J. L. (3 Dutch.) 416.

⁵ *Terrell v. Colebrook*, 35 Conn. 188; though see *Wilson v. McClure*, 50 Ill. 366. See *supra*, § 61.

⁶ *Cameron v. School Dist.* 42 Vt. 507.

⁷ *Michener v. Lloyd*, 16 N. J. Eq. 38.

⁸ *Regan v. Regan*, 72 N. C. 195.

⁹ *Sherman v. Smith*, 20 Ill. 350; *Hughes v. Christy*, 26 Tex. 230.

¹⁰ *Foster v. Trull*, 12 Johns. R. 456; *Harker v. Dement*, 9 Gill, 7; *Reilly v. Cavanagh*, 29 Ind. 435; *Milan v. Pemberton*, 12 Mo. 598; *Flynn v. Ins. Co.* 17 La. An. 135; *Gliddon v. Goos*, 21 La. An. 682.

¹¹ *Infra*, § 991; *Frost v. Shapleigh*, 7 Greenl. 236; *Mathews v. Bowman*, 25 Me. 157; *Torrey v. Berry*, 36 Me.

589; *Sturtevant v. Randall*, 53 Me. 149; *Bassett v. Marshall*, 9 Mass. 312; *Pease v. Smith*, 24 Pick. 122. See *Wabash Canal v. Rheinhardt*, 22 Ind. 463; *Massey v. Westcott*, 40 Ill. 160; *Dowling v. Hodge*, 2 McM. 209; *Doty v. Brown*, 4 Comst. 71; *Dunckel v. Wiles*, 11 N. Y. 420; *White v. Madison*, 26 N. Y. 117; *McKnight v. Devlin*, 52 N. Y. 399.

¹² And see *R. v. Bird*, 2 Den. C. C. 94; 5 Cox C. C. 20; *Perkins v. Walker*, 19 Vt. 144; *Com. v. Dellane*, 11 Gray, 67; *Com. v. Sutherland*, 109 Mass. 342; *Davisson v. Gardner*, 10 N. J. L. 289; *Butler v. Slam*, 50 Penn. St. 456; *Federal Hill Co. v. Mariner*, 15 Md. 224; *Porter v. State*, 17 Ind. 415; *Duncan v. Com.* 6 Dana, 295; *Shirley v. Fearne*, 33 Miss. 653; *State v. Andrews*, 27 Mo. 267; *State v. Scott*, 31 Mo. 121; *State v. Thornton*, 37 Mo. 360; *State v. De Witt*, 2 Hill (S. C.), 292; *Rake v. Pope*, 7 Ala. 161; *State v. Matthews*, 9 Port. 370. See fully, *infra*, § 988.

¹³ *Webb v. Alexander*, 7 Wend. 281; *Inman v. Jenkins*, 3 Ohio, 271.

the record;¹ to prove that a judgment against an indorser was not intended to pass as collateral to a judgment against the principal;² to prove that a new cause of action was introduced by an amendment to a declaration, thereby discharging an attachment;³ to identify property levied on;⁴ to prove that a judgment was put in evidence in a former suit;⁵ to prove that parties interested united in limiting a lien;⁶ to prove the alteration of a record;⁷ to prove the death of an *ex officio* administrator;⁸ to prove attendance on court as a witness;⁹ to prove a *jurat* of town officers, in lack of record;¹⁰ to prove that a particular person had been in prison;¹¹ to prove the attendance of juries and of judges as parts of a trial;¹² to explain the date of a writ.¹³

§ 65. Wherever a statute requires that a record should be kept by law, then the record is the proper evidence of such acts,¹⁴ and the acts can be primarily proved only by the record. Thus parol evidence of a person's enlistment into the military service of the United States is not admissible.¹⁵ Nor is a certificate officially signed by the provost marshal of the district, that the plaintiff "has this day been credited as a recruit in the navy to the" defendant town, "by order of the A. A. Pro. Mar. Gen. of Maine," legal evidence of his enlistment.¹⁶ So taxation, if the records are not lost, can only be proved by the record.¹⁷

Of administrative records parol evidence is inadmissible.

¹ Miles v. Caldwell, 2 Wall. 35; Parker v. Thompson, 3 Pick. 429; Dunlap v. Glidden, 34 Me. 517; Stedman v. Patchin, 34 Barb. 218; Justice v. Justice, 3 Ired. L. 58; Walsh v. Harris, 10 Cal. 391. See fully, § 986.

² Bank v. Fordyce, 9 Penn. St. 275. See Darling v. Dodge, 36 Me. 370.

³ Freeman v. Creech, 112 Mass. 180.

⁴ Darling v. Dodge, 36 Me. 370.

⁵ Denny v. Moore, 13 Ind. 418.

⁶ Sankey v. Reed, 12 Penn. St. 95.

⁷ Brier v. Woodbury, 1 Pick. 362.

⁸ Saltonstall v. Riley, 28 Ala. 164.

⁹ Baker v. Brill, 15 Johns. R. 260.

¹⁰ Hathaway v. Addison, 48 Me. 440.

¹¹ Real v. People, 42 N. Y. 270; Howser v. Com. 51 Penn. St. 332.

¹² Massey v. Westcott, 40 Ill. 160.

¹³ Johnson v. Farwell, 7 Me. 370; Society Prop. Gospel v. Whitcomb, 2 N. H. 227.

¹⁴ Supra, §§ 60, 61.

¹⁵ Atwood v. Winterport, 60 Me. 250. See Terrell v. Colebrook, 35 Conn. 188.

¹⁶ Atwood v. Winterport, 60 Me. 250. "The fact of enlistment is a matter of record. It must be proved by a duly authenticated copy from the army records. A sworn copy is

¹⁷ Pittsfield v. Barnstead, 38 N. H. 115; Farrar v. Fessenden, 39 N. H. 268.

§ 66. The probate of a will is a copy of the will under the seal of the probate court, with "a certificate stating that the original will has been duly proved and registered, and that administration of the goods of the deceased has been granted to one or more of the executors named therein."¹ Without this proof, the will itself, as a title to property, or as giving a right to the executor or administrator to sue, cannot be received in evidence.² The probate may be proved either by producing the document itself,³ or the register from the court of probate, containing an entry that the will has been proved, and probate granted,⁴ or a certified or examined copy of such register.⁵ Under local statutes, this admissibility extends to certified copies of wills and probates registered in other states.⁶ But

admissible, or a copy certified by the proper certifying officer. But the certificate offered is not, and does not purport to be, a copy of any recorded fact, or of any record. It is the assertion of the person certifying that the fact therein stated is true. A mere certificate that a certain fact appears of record, without the production of an authenticated copy of the record, is not evidence of the existence of the fact. *Owen v. Boyle*, 15 Me. 147. The officer certifying should certify a transcript of the record." *Appleton, C. J., Atwood v. Winterport*, 60 Me. 252.

¹ Taylor's Ev. § 1426, citing *Toller* on Ex. 58.

² *Ibid.*; *Jones v. Goodrich*, 5 Moo. P. C. 15; *Allen v. Dundas*, 3 T. R. 125; *Ryves v. Wellington*, 9 Beav. 579; *Hood v. Barrington*, L. R. 6 Eq. 218; *Graham v. Whitely*, 26 N. J. L. 254; *Cogswell v. Burtis*, 1 Hoff. (N. Y.) 198. See *Doe v. Gunning*, 7 A. & E. 244. As to conclusiveness of probate of will, see *infra*, § 811.

³ In such case the seal proves itself. *Kempton v. Cross*, Hardw. 108.

⁴ *Cox v. Allingham*, Jac. 514; *R. v. Ramsbotham*, 1 Lea. 25 n.; *Elden v.*

Keddell, 8 East, 187; *Jackson v. Lucett*, 2 Caines, 363; *Russell v. Schuyler*, 22 Wend. 277.

⁵ Taylor's Ev. § 1427; *R. v. Phillpott*, 2 Den, 308; *Dorrett v. Meux*, 15 C. B. 142; *Fleeger v. Pool*, 1 McLean, 185; *Ackley v. Dygert*, 33 Barb. 176; *Kenyon v. Stewart*, 44 Penn. St. 179; *Raborg v. Hammond*, 2 Har. & G. 42; *Taylor v. Burnside*, 1 Grat. 165; *Wynn v. Harman*, 5 Grat. 157; *Rowland v. M'Gee*, 4 Bibb, 439; *McConnell v. Brown*, Litt. (Ky.) 459; *Churchill v. Corker*, 25 Ga. 479; *Doe v. Roe*, 31 Ga. 593.

A copy of the probate and record of a will, duly certified by the probate judge, is conclusive evidence of the validity of the will, on the trial of a collateral issue between a stranger and the devisee, respecting the property devised; and is admissible as evidence on the trial of such issue, notwithstanding proceedings to contest it may be pending at the time it is offered and admitted as evidence. *Brown v. Burdick*, 25 Ohio St. 260.

⁶ *McConnell v. Brown*, Litt. (Ky.) 459; *Knight v. Wall*, 2 Dev. & B. L. 125; *Doe v. Roe*, 31 Ga. 593; *Phebe v. Quillin*, 21 Ark. 490.

the probate must be included in the certificate.¹ At common law, a foreign will, which is not admitted to probate by the law of the forum, must be proved by producing the will, if it is in existence; if it be lost, by proving a copy.² When a probate in one state is offered in evidence in another, the record is *prima facie* proof of its allegations.³

§ 67. The proof of letters of administration depends upon the local applicatory law. In England the proof is made by producing the register or act book containing the grant, or an exemplification or certified copy thereof; or by producing the letters themselves under the seal of the court; either of which modes of proof is primary evidence.⁴

§ 68. English practice was for some time disturbed by the question whether a witness, on cross-examination, could be examined as to the contents of a writing not yet in evidence. In Queen Caroline's case, in 1820, the following questions were put by the house of lords, and the following answers given by the judges:⁵ "First, Whether, in the courts below, a party, on cross-examination, would be allowed to represent, in the statement of a question, the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the wit-

Adminis-
tration
proved by
record.

Parol evi-
dence of
writings
not admis-
sible on
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amination.

¹ Morris v. Keyes, 1 Hill (N. Y.), 540; Nichols v. Romaine, 3 Abb. Pr. 122; Marr v. Gilliam, 1 Coldw. 488; Bright v. White, 8 Mo. 422.

² Graham v. Whiteley, 26 N. J. L. 254.

³ "The objection made to the proceedings in Rhode Island is that they were had without due notice to parties interested. The record of the original proceedings, by which a copy of the will was ordered to be filed and recorded, and the appellant received letters of administration in Rhode Island, has the recital, 'Notice having been duly given thereon, pursuant to law.' And the order allowing the account recited as follows: 'All persons interested in the settlement of said account having had legal notice.'

"Such recitals are not conclusive, it is true, where the jurisdiction of the foreign court depends upon the fact of notice. Carleton v. Bickford, 13 Gray, 591. If the same rule applies where the jurisdiction exists, but the notice is necessary to the regularity and validity of the proceedings by the *lex fori*, still the burden of impeaching them for that cause must rest upon the party asserting their invalidity." Wells, J., Clark v. Blackington, 110 Mass. 374.

⁴ Taylor's Ev. § 1428, citing Kempton v. Cross, Rep. temp. Hard. 108; Elden v. Keddell, 8 East, 187; Davis v. Williams, 13 East, 232.

⁵ Best's Evidence, § 473; 2 B. & B. 286.

ness the letter, and having asked that witness whether the witness wrote that letter, and his admitting that he wrote such letter?" "Secondly, Whether, when a letter is produced in the courts below, the court would allow a witness to be asked, upon showing the witness only a part of or one or more lines of such letter and not the whole of it, whether he wrote such part or such one or more lines; and in case the witness shall not admit that he did or did not write the same, the witness can be examined to the contents of such letter?" "Thirdly, Whether, when a witness is cross-examined, and, upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness can be examined in the courts below whether he did not, in such letter, make statements such as the counsel shall, by questions addressed to the witness, inquire are or are not made therein; or whether the letter itself must be read as the evidence to manifest that such statements are or are not contained therein; and in what stage of the proceedings, according to the practice of the courts below, such letter could be required by counsel to be read or be permitted by the court below to be read?" The first of these questions the judges answered in the negative, on the ground that "The contents of every written paper are, according to the ordinary and well established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence; the proper course, therefore, is to ask the witness whether or no that letter is of the handwriting of the witness. If the witness admits that it is of his or her handwriting, the cross-examining counsel may, at his proper season, read that letter as evidence, and, when the letter is produced, then the whole of the letter is made evidence. One of the reasons for the rule requiring the production of written instruments is, in order that the court may be possessed of the whole. If the course which is here proposed should be followed, the cross-examining counsel may put the court in possession only of a part of the contents of the written paper; and thus the court may never be in possession of the whole, though it may happen, that the whole, if produced, may have an effect very different from that which might be produced by a statement of a part." The first part of the second question, namely, "Whether, when a letter is produced in the courts below, the

court would allow a witness to be asked, upon showing the witness only a part or one or more lines of such letter, and not the whole of it, whether he wrote such part?" the judges thought should be answered by them in the affirmative in that form; but to the latter, "and in case the witness shall not admit that he did or did not write such part, whether he can be examined as to the contents of such letter," they answered in the negative, for the reasons already given, namely, that the paper itself is to be produced, in order that the whole may be seen, and the one part explained by the other. To the first part of the third question, Lord Chief Justice Abbott answered as follows: "The judges are of opinion, in the case propounded, that the counsel cannot, by questions addressed to the witness, inquire whether or no such statements are contained in the letter; but that the letter itself must be read to manifest whether such statements are or are not contained in that letter. In delivering this opinion to your lordships, the judges do not conceive that they are presuming to offer to your lordships any new rule of evidence, now for the first time introduced by them; but that they found their opinion upon what, in their judgment, is a rule of evidence as old as any part of the common law of England, namely, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself, and not by parol evidence." To the latter part of the question he returned for answer: "The judges are of opinion, according to the ordinary rule of proceeding in the courts below, the letter is to be read as the evidence of the cross-examining counsel, as part of his evidence in his turn, after he shall have opened his case; that that is the ordinary course; but that, if the counsel who is cross-examining suggests to the court that he wishes to have the letter read immediately, in order that he may, after the contents of that letter shall have been made known to the court, found certain questions upon the contents of that letter, to be propounded to the witness, which could not well or effectually be done without reading the letter itself, that becomes an excepted case in the courts below, and for the convenient administration of justice, the letter is permitted to be read at the suggestion of the counsel, but considering it, however, as part of the evidence of the coun-

sel proposing it, and subject to all the consequences of having such letter considered as part of his evidence."

The following additional question was then put: "Whether, according to the established practice in the courts below, counsel cross-examining are entitled, if the counsel on the other side object to it, to ask a witness whether he has made representations of a particular nature, not specifying in his question whether the question refers to representations in writing or in words?" Abbott, C. J., delivered the following answer of the judges: "The judges find a difficulty to give a distinct answer to the question thus proposed by your lordships, either in the affirmative or negative, inasmuch as we are not aware that there is, in the courts below, any established practice which we can state to your lordships as distinctly referring to such a question propounded by counsel on cross-examination, as is here contained; that is, whether the counsel cross-examining are entitled to ask the witness whether he has made such representation; for it is not in the recollection of any one of us that such a question, in those words, namely, 'whether a witness has made such and such representation,' has at any time been asked of a witness. Questions, however, of a similar nature are frequently asked at *nisi prius*, referring rather to contracts and agreements, or to supposed contracts and agreements, than to declarations of the witness; as, for instance, a witness is often asked whether there is an agreement for a certain price for a certain article, — an agreement for a certain definite time, — a warranty, — or other matter of that kind being matter of contract; and when a question of that kind has been asked at *nisi prius*, the ordinary course has been for the counsel on the other side not to object to the question as a question that could not properly be put, but to interpose, on his own behalf, another intermediate question; namely, to ask the witness whether the agreement referred to in the question originally proposed by the counsel on the other side was or was not in writing; and, if the witness answers that it was in writing, then the inquiry is stopped, because the writing must be itself produced. My lords, therefore, although we cannot answer your lordships' question distinctly in the affirmative or the negative, for the reason I have given, namely, the want of an established practice referring to such a question by counsel; yet, as we are all of opinion that

the witness cannot properly be asked, on cross-examination, whether he has written such a thing (the proper course being to put the writing into his hands, and ask him whether it be his writing), considering the question proposed to us by your lordships, with reference to that principle of law which requires the writing itself to be produced, and with reference to the course that ordinarily takes place on questions relating to contracts or agreements, we, each of us, think, that if such a question were propounded before us at *nisi prius*, and objected to, we should direct the counsel to separate the question into its parts. My lords, I find I have not expressed myself with the clearness I had wished, as to dividing the question into parts. I beg, therefore, to inform the house, that, by dividing the question into parts, I mean that the counsel would be directed to ask whether the representation had been made in writing or by words. If he should ask, whether it had been made in writing, the counsel on the other side would object to the question; if he should ask whether it had been made by words, that is, whether the witness had said so and so, the counsel would undoubtedly have a right to put that question, and probably no objection would be made to it."

On commenting on the above procedure, Mr. Best remarks that the rule that counsel who has a document in his possession shall not represent its contents to a witness, "may possibly be defended on the ground that whoever uses a document in a court of justice has no right to suppress any part of it, or prevent its speaking for itself; although the fitness of extending even this principle to evidence *extra causam* is not beyond dispute. But whether a witness may be asked, with a view to test his memory or credit, if he has ever made a representation, not specifying whether verbal or written; or has written a letter, not saying to whom, when, or under what circumstances; in which representation or letter he has made statements inconsistent with the evidence given by him *in causa*, is a much larger question. It has been suggested that the above answers of the judges have not resolved this point in the negative, and that they were all based on the assumption that the letter was in the possession of the cross-examining counsel. In practice, however, a different construction is put upon them; and we should at once dismiss the subject, had not that practice been condemned by text writers

on the law of evidence,¹ and the practice founded on them been recently modified by the legislature. And here it may be doubted how far the proceedings in Queen Caroline's case are binding on tribunals, the answers of the judges to the house of lords having no binding force *per se*; and although in that case the house adopted and acted on those answers, it was not sitting judicially, but with a view to legislation, which finally proved abortive."²

In New York the rule in Queen Caroline's case has been so far recognized as to preclude the proving, on cross-examination, by parol, a written instrument.³ It has been also explicitly held that when a witness is cross-examined as to whether he wrote a letter containing certain statements, the writing must be first shown to the witness.⁴ Merely showing the letter to the witness is in any view insufficient. He must have time to notice its contents.⁵

¹ See Taylor's Ev. § 1301; Stark. Ev. 226-7.

² Best's Evidence, § 474. The answers of the judges in Queen Caroline's case were condemned by the common law commissioners of 1850, and at length received the condemnation of the legislature. The 17 & 18 Vict. c. 125, § 24, following almost verbatim the recommendation of those commissioners, enacts: "A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided, always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall

think fit." By sect. 103, the enactments in this section are extended to every court of civil judicature in England and Ireland; and 28 Vict. c. 18, secs. 1 and 5, extends them to criminal cases.

³ Speyer v. Stern, 2 Sweeny, 516; Newcomb v. Griswold, 24 N. Y. 298; Gaffney v. People, 50 N. Y. 223, cited *infra*.

⁴ Stephens v. People, 19 N. Y. 549; Stamper v. Griffin, 12 Ga. 450; Callanan v. Shaw, 24 Iowa, 441. *Contra*, Randolph v. Woodstock, 35 Vt. 291.

⁵ Morrison v. Myers, 11 Iowa, 538.

"It is competent for a party on the trial to prove that a witness, on the part of his adversary, has made oral statements inconsistent with evidence upon a material question given by such witness on the trial, for the purpose of impeaching the credibility of a witness, and weakening the force of the evidence. But it is requisite that the party offering the impeaching evidence should first call the attention of the witness to the circumstances under which the statements were made,

§ 69. A statute which prescribes certain kind of evidence as proof of certain facts does not, unless it expressly so provides, exclude other proof of such facts when the statutory proof cannot be had.¹ Thus where the proceedings of directors, commissioners, public trustees, and the like, are entered in books, the fact that such books are rendered by statute admissible in evidence does not exclude parol proof of what has taken place at the respective meetings.²

Statutory designation of evidence not necessarily exclusive.

§ 70. As illustrations of the doctrine that primary evidence is, in the sense before us, that which is immediate, we may mention the case of a newspaper, when the question is, what the newspaper published. For this purpose, the original manuscript from which the paper is printed is secondary; and a written copy or reprint by third parties of the newspaper is secondary; the primary evidence, receivable as such, is the newspaper itself, as issued by the party whose liability it is sought to establish.³

"Primary" means "immediate."

§ 71. Much confusion has arisen from the ambiguity of the terms which are used to designate the evidence which is thus excluded. Mr. Bentham⁴ distinguishes the two classes as "original" and "unoriginal;" which Mr. Best, though following in most points Mr. Bentham, changes into "original" and "derivative." But this is scarcely exact, as there is no evidence that is not in some sense "original;" none that is not in some sense "derivative."⁵ The dis-

The test is, not authority, but immediateness of impression.

that he may have an opportunity of correcting the evidence given on the trial, or of explaining the apparent inconsistency between his evidence and his former statements. The reason of the rule applies as strongly to written as to oral statements made by the witness; and when his evidence is sought to be impeached by written statements, alleged to have been made by him, the writing should be first produced, so that he may have an opportunity for inspection and examination. And as the writing is the best evidence of the statement made by the witness therein, questions as to the contents are not ordinarily admissible.

The Queen's case, 2 B. & B. 287; Newcomb v. Griswold, 24 N. Y. 298; Greenleaf on Evidence, § 463; 2 Phillips on Evidence, 962." Andrews, J., Gaffney v. The People, 50 N. Y. 223.

¹ Kendall v. Kingston, 5 Mass. 521; Green v. Gill, 8 Mass. 111; Com. v. Cutter, 8 Mass. 279; Bovee v. McLean, 24 Wisc. 225.

² Miles v. Bough, 3 Q. B. 845; Inglis v. R. R. 1 Macq. Sc. Ca. H. of L. 112.

³ Brunswick v. Harmer, 14 Q. B. 185; R. v. Amphlett, 6 D. & R. 126; Bond v. Bank, 2 Ga. 92.

⁴ Rat. Jud. Ev. book vi. chap. iii.

⁵ See supra, § 8, 15.

tion is based on the nearness of relation of the witness to the thing as to which he testifies; if he was in immediate contact with it, or separated only by material objects, then his relation is primary, and his testimony is admitted; if he is separated by the agency of another self-determining agent, then the relationship is broken, and his testimony is not admitted. A., for instance, sees a railroad collision, though it may be A. is half blind, and is a mile off, and therefore a very uncertain observer. A. is an admissible witness, because his relationship, not being broken by the interposition of another self-determining agent, is immediate to the thing testified to.¹ B., a person of great accuracy and intelligence, standing close to the scene of the collision, takes notes, and reads these notes to C., who is called as a witness, and as to whose accuracy and honesty in reproducing B.'s impressions there can be no doubt, but who is excluded, because he does not stand in immediate relation to the thing testified to, but this relation is broken by the interposition of B. The rule may in such cases work hardly, but it has for its general application three important reasons: *first*, by going to first hand, greater accuracy is usually attainable; *secondly*, it is for the adjudicating tribunal to adjust degrees of credibility to such witnesses as are admitted; *thirdly*, to substitute for the sworn statements of immediate observers, tested by cross-examination, the impressions received by others as to what such observers said when unsworn and without cross-examination, would open the way to great frauds.

§ 72. A series of witnesses may observe a particular transaction; the impressions of some may be strong, the impressions of others may be faint; but the faint impression is not to be excluded because of its faintness, nor because it is inferior, in respect of intensity, to the strong impression. In other words, what constitutes excluding secondariness is, not inferiority as to capacity to testify accurately, but removal, by the interposition of intelligent media, from the thing testified. There may be several thousand sheets, for instance, printed from the same type, and the last sheets printed may be blurred and confused; but the last is as much an original as the first; and would be as admissible as the first;² while a written copy made by an amanuensis from the first

No primary evidence is rejected because of its faintness.

¹ U. S. v. Gibert, 2 Sumn. 19.

² See *infra* §§ 92, 409.

would be excluded because secondary.¹ Hence comes the maxim, that secondariness goes not to conclusiveness but to grade. Secondary evidence is excluded not merely because it is inferior, but because it presupposes more accurate and immediate evidence held back by the party offering.² So, among witnesses standing on the same grade, one may be secondary to another as to trustworthiness, but this does not exclude him. In the Tichborne case, for instance, all witnesses who claimed to have known Roger Tichborne were equally admissible as primary witnesses, though some were near relations and intimate friends of Roger, while others had been merely casual acquaintances. The test is, "Do you testify at first hand?" If so, no matter how incredible may be the testimony, it is receivable, so far as concerns the present test. So the testimony of a mere bystander is primary evidence of a conversation he overhears, though not likely to be so accurate as that of a participant.³ So, as will hereafter be more fully seen, the fact that the alleged writer is not called as to the forgery of his signature, does not exclude other witnesses.⁴ Yet where secondary evidence of high accuracy is kept back by a party, the court may refuse to permit him to produce evidence of an inferior type, until the higher be accounted for.⁵ If a party has a *fac-simile* of a lost paper, he cannot prove such paper by calling a witness as to its contents.⁶ A letter-book, however, in which press copies are taken, is held to be so far a copy as to stand in the same relation to the original as do copies taken from itself. The letter-book, and copies taken from it, are equally secondary.⁷

¹ Bond v. Bank, 2 Ga. 92.

² Morrison v. Chapin, 97 Mass. 72; Lee v. Lee, 9 Penn. St. 169; Shoenberger v. Hackman, 37 Penn. St. 87; Richardson v. Milburn, 17 Md. 67; Young v. Mertens, 27 Md. 114; Carpenter v. Dame, 10 Ind. 125; McCrery v. Turk, 29 Ala. 244.

³ Peeples v. Smith, 8 Rich. S. C. 90.

⁴ R. v. Hazy, 2 C. & P. 458; R. v. Hurley, 2 M. & Rob. 473; Smith v. Prescott, 17 Me. 277; Ainsworth v. Greenlee, 1 Hawks, 190; McCaskle v. Amarine, 12 Ala. 17. *Infra*, §§ 705-707.

⁵ *Infra*, § 90; Stevenson v. Hoy, 43 Penn. St. 191; Ellis v. Huff, 29 Ill. 449; Harvey v. Thorpe, 28 Ala. 250.

⁶ Stevenson v. Hoy, 43 Penn. St. 191.

⁷ *Infra*, § 93. "The defendant, by giving notice to produce the original letters written by him to the plaintiffs, had entitled himself to prove their contents by secondary evidence. He produced copies, made by his wife, from his letter-book, into which the originals had been first copied by a machine-press; and testified that he had compared these copies with those

§ 73. As a general principle it may in fact be stated that a written copy of a written instrument ("transcriptitious" evidence, as Mr. Bentham calls it) will not be received when the original can be obtained.¹ Nor is a witness's written receipt of a payment admissible when

Written
secondary
evidence
inadmissi-
ble.

in the letter-book, and that they were correct. He also testified that he deposited the originals in the post-office, directed to the plaintiffs. The offer to send for the letter-book, and produce it in court, if desired, must be taken at least to relieve the defendant from any suspicion that the letter-book was improperly kept back. The objection to the admissibility of the copies stands, therefore, strictly upon the legal ground stated; namely, 'that they were not copies of the original, and that the letter-book itself would be the best evidence.'

"Whenever a copy of a record or document is itself made original or primary evidence, the rule is clear and well settled that it must be a copy made directly from, or compared with, the original. If the first copy be lost, or in the hands of the opposite party, so long as another may be obtained from the same source, no ground can be laid for resorting to evidence of an inferior or secondary character. The admission of a transcript from the record of a deed, or other private writing, for the record of which provision is made by law, is not an exception to, but only a modification of, the same rule. But when the source of original evidence is exhausted, and the resort is properly had to secondary proof, the contents

of private writings may be proved, like any other fact, by indirect evidence. The admissibility of evidence offered for this purpose must depend upon its legitimate tendency to prove the facts sought to be proved, and not upon the comparative weight or value of one or another form of proof. The jury will judge of its weight, and may give due consideration to the fact that a less satisfactory form of proof is offered, while a more satisfactory one exists and is withheld, or not produced when it might have been readily obtained. But there are no degrees of legal distinction in this class of evidence. Although there has been much diversity of practice, and the decisions are far from uniform, more frequently turning upon special circumstances and facts than upon a general principle; the tendency of authority is, as we think, towards the establishment of the rule here stated. 2 Phil. Ev. (4th Am. ed.) 568; 1 Greenl. Ev. §§ 84, 582; *Stetson v. Gulliver*, 2 Cush. 494; *Robertson v. Lynch*, 18 Johns. 451; *Winn v. Patterson*, 9 Pet. 663; *Brown v. Woodman*, 6 C. & P. 206; *Doe v. Ross*, 7 M. & W. 102.

"In this case the letter-book, if produced, would have been only secondary evidence. We are satisfied that the copies admitted by the court below were sufficiently verified to justify

¹ *Bird v. Bird*, 40 Me. 392; *Putnam v. Goodall*, 31 N. H. 419; *Torrey v. Fuller*, 1 Mass. 524; *Wallace v. Bradshaw*, 6 Dana. 382; *Davidson v. Davidson*, 10 B. Mon. 115; *Robinson v.*

Bealle, 20 Ga. 275 *Cloud v. Hartbridge*, 28 Ga. 272; *Knight v. Knight*, 12 La. An. 396; *Lawrence v. Grout*, 12 La. An. 835.

he can be had to prove such payment on his personal examination.¹

§ 74. When a contract is executed in counterparts, each party signing only the counterpart by which he is bound, and delivering such counterpart to the other party, each counterpart is primary evidence against the party signing it and those claiming under him,² and may be read in evidence, against the other party, as secondary, in case, after notice, he should fail to produce the counterpart in his hands.³ When, however, solemn instruments are executed in duplicates or triplicates, all must be accounted for, so has it been intimated, when each has been executed by all the parties.⁴ Each is primary in respect to the other,⁵ and hence comes the conclusion that no one can exclude the other, and that one should not be received in the absence of the other, unless such absence should by some proof, however faint, be explained.⁶

Counterparts may be received singly; but not so duplicates.

their admission as competent evidence of the contents of the original letters." Wells, J., *Goodrich v. Weston*, 102 Mass. 363.

¹ *Ford v. Smith*, 5 Cal. 314; *Leatherbury v. Bennett*, 4 Har. & M. 392. But see *McGregor v. Bugbee*, 15 Vt. 734.

² *Roe v. Davis*, 7 East, 363; *Carlisle v. Blamire*, 8 East, 487; *Paul v. Meek*, 2 Y. & J. 116; *Houghton v. Koenig*, 18 C. B. 235; *Stowe v. Querner*, L. R. 5 Exch. 155; *Cleveland R. R. v. Perkins*, 17 Mich. 296.

³ *Munn v. Godbold*, 3 Bing. 292; *S. C.* 11 Moore, 292; *Doe v. Ross*, 7 M. & W. 102; *Hall v. Ball*, 3 M. & Gr. 212; *Hawes v. Forster*, 1 M. & Rob. 368.

⁴ *Alivon v. Furnivall*, 1 C., M. & R. 292, by Parke, B.

⁵ *Colling v. Treweek*, 6 B. & C. 398; *Brown v. Woodman*, 6 C. & P. 206.

⁶ See *Philipson v. Chase*, 2 Camp. 111; *infra*, § 93.

"On one or two occasions," says Mr. Taylor (§§ 90, 397), "where it was necessary to show that the plain-

tiff's ancestor had exercised acts of ownership over the property in question, counterparts of leases older than the period of living memory, and found in the ancestor's muniment room, have been admitted in evidence even against strangers, though they were executed by no one but the persons named as lessees, who were not shown to have actually held under them, and though no excuse was given for not producing the original leases sealed by the ancestor. *Doe v. Pulman*, 3 Q. B. 622; *Clarkson v. Woodhouse*, 5 T. R. 412; 3 Dougl. 189. It is difficult to reconcile these decisions with strict principle, since the counterparts amounted in fact to no more than admissions by third parties that the ancestor was seised; but the judges appear to have relaxed the rule, in consequence of the acknowledged difficulty of tracing acts of ownership after the lapse of many years; and looking at the question in this light, few persons will feel inclined to quarrel with the doctrine as now established."

§ 75. A broker, when he closes a negotiation as the common agent of both parties, enters it in his business book, and gives to each party a copy of the entry. If there be no entry, he gives simply notes or memoranda of the transaction to the parties. The note he gives to the seller is called the *sold note*, that which he gives to the buyer is called the *bought note*. To adopt Mr. Benjamin's classification,¹ there are four varieties of these notes used in practice. "The *first* is where on the face of the note the broker professes to act for both the parties whose names are disclosed in the note. The sold note, then, in substance, says, 'Sold for A. B. to C. D.,' and sets out the terms of the bargain; the bought note begins, 'Bought for C. D. of A. B.,' or equivalent language, and sets out the same terms as the sold note, and both are signed by the broker. The *second* form is where the broker does not disclose in the bought note the name of the vendor, nor in the sold note the name of the purchaser, but still shows that he is acting as broker, not principal. The form, then, is simply 'Bought for C. D.,' and 'Sold for A. B.' The *third* form is where the broker, on the face of the note, appears to be the principal, though he is really only an agent. Instead of giving to the buyer a note, 'Bought for you by me,' he gives it in this form: 'Sold to you by me.' By so doing he assumes the obligation of a principal, and cannot escape responsibility by parol proof that he was acting only as broker for another, although the party to whom he gives such a note is at liberty to show there was an unnamed principal, and to make this principal responsible.² The fourth form referred to by Mr. Benjamin is where the broker professes to sign as a broker, but is really a principal,³ in which case his signature does not bind the other party, and he cannot sue upon the contract, except upon proof of usage conferring on him this right. Supposing, then, that we have before us both

¹ Benj. on Sales, § 276.

² See Whart. on Agency, § 719; notes to Thomson v. Davenport, 2 Smith's Leading Cas. 349; Higgins v. Senior, 8 M. & W. 834; Williams v. Bacon, 2 Gray. 387; Fuller v. Hooper, 3 Gray, 341; Eastern R. R. v. Benedict, 5 Gray, 561; Dykers v. Town-

send, 24 N. Y. 57. See Merritt v. Clason, 12 Johns. R. 102; Clason v. Bailey, 14 Johns. R. 484.

³ See, as illustrations. Sharman v. Brandt, L. R. 6 Q. B. 720; and Mollett v. Robinson, L. R. 5 C. P. 648; 7 C. P. 84.

the broker's book of original entries, and the bought and sold notes, which of these is the primary evidence of the contract between buyer and seller? Much conflict exists in the English courts on this point;¹ but the better opinion is that the signed entry made by the broker in his book, he making the entry as agent of both parties, is the primary contract, and when it exists, the bought and sold notes are secondary, being transcripts of the entry in the book.² If there be no entry (or, it has been intimated, only an unsigned entry), then the bought and sold notes are primary.³ It is, of course, plain that if no notes have been transmitted to the principals, the broker's entry is primary, and may be sued on.⁴ When the bought and sold notes substantially differ, then, it is held, there is no binding contract.⁵ If, however, the bought and sold notes are held to be primary, or if they are introduced as secondary, on the non-production of the broker's book, it is enough for the party suing to produce the note in his possession, and to show that the broker was employed as agent by the party sued.⁶

§ 76. The rule before us has been frequently applied to telegrams. What is said of letters applies to telegram contracts. The original message is the primary evidence; and only on proof excusing its production can its contents be shown by parol.⁷ Originals of telegrams must be produced. It has, however, been ruled that

¹ See Taylor's Ev. § 390; Wharton on Agency, § 720.

² To this effect, see *Benj. on Sales*, 2d ed. 276-294. And see *Thornton v. Charles*, 9 M. & W. 802; *Grant v. Fletcher*, 5 B. & C. 436; *Henderson v. Barnewall*, 1 Y. & J. 389; *Heyman v. Neale*, 2 Camp. 337; *Sievwright v. Archibald*, 17 Q. B. 115, overruling *Thornton v. Meux*, 1 M. & M. 43.

³ See *Sievwright v. Archibald*, 17 Q. B. 115; *Parton v. Crofts*, 16 C. B. (N. S.) 11. See, however, as contesting the above, *Goom v. Allalo*, 6 B. & C. 117; *Thornton v. Kempster*, 5 Taunt. 786; *Durrell v. Evans*, 1 H. & C. 174, overruling *S. C.*, under name *Darrell v. Evans*, 6 H. & N. 660. See, also, *Parton v. Crofts*, 16 C. B. (N. S.) 11.

⁴ *Townend v. Drakeford*, 1 C. & Kir. 20; *Pitts v. Beckett*, 13 M. & W. 746; *Richey v. Garvey*, 10 Ir. L. R. 544.

⁵ *Cowie v. Remfry*, 5 Moo. P. C. R. 237; though see *Heyworth v. Knight*, 17 C. B. (N. S.) 310.

⁶ *Hawes v. Forster*, 1 M. & Rob. 368. As to degree in which variance between bought and sold notes will be fatal, see *Cowie v. Remfry*, 5 Moo. P. C. R. 232; *Thornton v. Kempster*, 5 Taunt. 786; *Townend v. Drakeford*, 1 C. & K. 20; *Gregson v. Ruch*, 4 Q. B. 737; *Kempson v. Boyle*, 3 H. & C. 763; *Sievwright v. Archibald*, 17 Q. B. 103. And see *infra*, § 968, as to admission of evidence to control broker's memoranda.

⁷ *Scott & Jarn. on Tel.* § 340; *How-*

if the telegraph company is authorized by the sender to act for him (which is inferred from his sending a message over its lines), the message delivered is primary evidence as against the sender;¹ but if the receiver is the employer, then the original message given by the sender to the operator must be produced.² A telegraphic answer to a letter may, with such letter, be used to prove a contract.³ In such case, the telegram *as delivered* and acted on by the *receiver* becomes primary evidence of the contract.⁴ When there has been no previous communications between the parties, a telegram sent for the purpose of settling a particular detail is evidence only against the sender as to the particular point.⁵ Proof that the message was sent over the wires addressed to a particular person at a particular place, he being shown to be at the time resident at such a place, may present a *prima facie* case of the reception of such telegram by the sendee.⁶ But the sending of a telegram addressed to a person at a given place, and the receipt of an answer purporting to be from him in due course, is not admissible to prove that he was in the place at the time in question.⁷ It is scarcely necessary to add that when the original message is produced against a party, it must be duly proved.⁸

ley v. Whipple, 48 N. H. 488; Durkee v. R. R. 29 Vt. 127; Com. v. Jeffries, 7 Allen, 548; Lewis v. Havens, 40 Conn. 363; Benford v. Sanner, 40 Penn. St. 9; West. Un. Tel. Co. v. Hopkins, 49 Ind. 223; Matteson v. Noyes, 25 Ill. 591; Williams v. Brickell, 37 Miss. 682; Richie v. Bass, 15 La. An. 668.

¹ Morgan v. People, 59 Ill. 58.

² Durkee v. R. R. 29 Vt. 127.

³ Taylor v. Robt. Campbell, 20 Mo. 254. *Infra*, § 618.

⁴ Dunning v. Roberts, 35 Barb. 463; Trevor v. Wood, 36 N. Y. 307.

⁵ Beach v. R. R. 37 N. Y. 457.

⁶ Com. v. Jefferies, 7 Allen, 548. See *infra*, § 1323-8-9.

⁷ Howley v. Whipple, 48 N. H. 487.

⁸ Lewis v. Havens, 40 Conn. 363.

That the telegram itself as delivered, and before it is adopted by the

parties as part of a contract, is but secondary evidence as against the sender, is well shown in the following opinion:—

“In *Connecticut v. Bradish*, 14 Mass. 296, a letter was admitted, as evidence against a party, where there was no evidence of the handwriting except the testimony of a witness that it was the same he had received in reply to a letter which he had addressed to the same party; and this ruling was sustained. The same doctrine is held in 1 *Greenl. Ev.* § 578, and cases cited; *Johnson v. Davenport*, 19 Johns. 134; *Chaffee v. Taylor*, 3 Allen, 598.

“Now it is claimed that, as in case of a letter, so in case of a telegraphic dispatch, the person who answers a dispatch is so generally and uniformly the person to whom the communication was addressed, that it may be

II. EXCEPTIONS TO RULE.

§ 77. While parol proof of a producible written instrument cannot be received, yet where the parol evidence is as near to the thing testified to as the written, then each is primary.¹ Thus the date of A.'s birth is registered by one of his parents; this is primary evidence. But

Exceptions where parol evidence is as primary as written.

safely acted upon, and that it is thus acted upon in all the business arrangements of the country.

“But there is a difference in principle between the two cases, — the letter received in reply to a written communication, and the dispatch received in reply to the same communication sent by telegraph. Telegraphic messages are instruments of evidence for various purposes, and are governed by the same general rules which are applied to other writings. If there be any difference it results from the fact that messages are first written by the sender, and are again written by the operator at the other end of the line, thus causing the inquiry as to which is original. The original message, whatever it may be, must be produced, it being the best evidence; and, in case of its loss, or of inability to produce it from any other cause, the next best evidence the nature of the case will admit of must be furnished. If there was a copy of the message existing it should be produced; if not, then the contents of the message should be shown by parol testimony. Scott & Jarnagan on Telegraphs, §§ 340, 341. Many cases are cited in the above work, from which it is held, that in all controversies between the

sender of the message and the company, the original message is the one left at the office by the party sending it; but where a man sends a proposition to another man, by telegraph, and gets a reply accepting the offer, the original message, so far as binding the acceptor is concerned, is the copy delivered to him at the other end. The message, as communicated to the acceptor, and his reply, as delivered to the operator to be returned, are what would govern in construing the contract, provided both parties voluntarily, and of their own accord, sent their messages by the telegraph, and thus adopted the company as their agent.

“In *Matteson v. Noyes*, 25 Ill. Rep. 591, Walker, J., in delivering the opinion of the court, says: ‘On the trial below, appellee offered, and the court admitted, in evidence what purported to be a telegram from the appellant to Loren Darling. There was no evidence that it was the original, or that the original had been lost or destroyed, or could not be produced, or that the paper offered was a copy. It was simply offered and admitted as the dispatch which was received by the witness from the telegraph office, and as primary evidence. It is an

¹ *Agricult. Cat. Ins. Co. v. Fitzgerald*, 16 Q. B. 435; *Tucker v. Welsh*, 17 Mass. 168; *McFadden v. Kingsbury*, 11 Wend. 667; *Prater v. Frazier*, 11 Ark. 249; *Thompson v. Mapp*,

6 Ga. 260; *Planters' Bk. v. Borland*, 5 Ala. 531; *Sparks v. Rawls*, 17 Ala. 211; *O'Neal v. Brown*, 20 Ala. 510; *Duffie v. Phillips*, 31 Ala. 571; *St. Louis R. R. v. Eakins*, 30 Iowa, 279.

the testimony of a relative cognizant of A.'s birth is also primary evidence of its date.¹ Marriage, as will hereafter be abundantly shown, may be proved by parol, though there be a written contract and a registry.² A militia company may be known by several names, and parol evidence to show this may be received,

elementary principle that a resort must always be had to the best evidence in the power of the party by which the fact is capable of proof, and it is an inflexible rule that, if it is in writing, the original must be produced, unless it be shown that it is destroyed, or not within the power of the party to produce it, before secondary evidence can be received of its contents. And before a copy of a written instrument can be admitted, a sufficient foundation must be laid by preliminary proof of destruction or absence. In this case no such proof was made to justify the reception of this copy in evidence.'

"There is also authority cited in *Scott & Jarnagan*, supra, from the 18th Upper Canada Rep. (Q. B.) 60, *Kinghorn v. The Montreal Telegraph Co.*, where Robinson, C. J., in delivering the opinion of the court, says: 'We must look, I think, in the case of each communication, at the papers delivered by the party who sent the message, not at the transcript of the message taken through the wire at the other end of the line, with all the chances of mistake in apprehending and writing the signals, and in transcribing for delivery.'

"These cases seem fully to apply to this case. There is a class of cases in which contracts have been made by telegrams, where, for the purpose of showing what the contract was, the message that was delivered to the person addressed, and the answer of acceptance as delivered for transmission,

were considered the originals; such are *Dunning & Smith v. Roberts*, 35 Barb. 463; *Trevor & Colgate v. Wood*, 36 N. Y. 307; and *Durkee v. Railroad Co.* 29 Vt. 127, in which last case, Redfield, J., in delivering the opinion of the court, says: 'In regard to the particular end of the line where inquiry is first to be made, it depends upon which party is responsible for the transmission across the line, or, in other words, whose agent the telegraph company is. The first communication in the transaction, if it is all negotiated across the wires, will only be effective in the form in which it reaches its destination. In such case inquiry should be made for the dispatch delivered. In default of that, its contents may be shown by the next best proof.'

"But these cases do not change or affect the doctrine so far as it is applicable to this case, because here the original answer delivered by Gould must be the one to be regarded as the original, so far as proof of handwriting is concerned, no matter in what form the message was received at the other end." *Sargent, J., Howley v. Whipple*, 48 N. H. 488-90.

¹ *Evans v. Morgan*, 2 C. & J. 453; *R. v. Manwaring*, Dear. & B. 132; *Morris v. Miller*, 4 Burr. 2057; *Suss. Peerage*, 11 Cl. & F. 85; *Carskad-den v. Poorman*, 10 Watts, 82; *Beeler v. Young*, 3 Bibb, 520; *Com. v. Norcross*, 9 Mass. 492.

² *Infra*, §§ 83-4. See *Limerick v. Limerick*, 4 Sw. & Tr. 252.

though the names may be noted in the records of the company.¹ Proof, again, of what is done at a legislative or corporate meeting is not excluded by the fact that the meeting keeps minutes which may be evidence.² Payment, also, of money to a third party, or for taxes, can be proved without accounting for the written receipt;³ and so may the admission of a debt, though coincident with the giving a note,⁴ and so may an oral notice sent at the time of a written demand.⁵ So the fact that trains on a railroad are due at a certain point on a certain time may be proved by parol as well as by the time table;⁶ so the fact of the posting of town ordinances may be proved by parol.⁷ In suits

¹ *Emerson v. Lakin*, 23 Me. 384.

² *Miles v. Bough*, 3 Q. B. 848; *Inglis v. R. R. 1 Macqueen*, S. C. 112.

³ *Rambert v. Cohen*, 4 Esp. 213; *Jacob v. Lindsay*, 1 East, 460; *Keene v. Meade*, 3 Peters, 7; *Dennett v. Crocker*, 8 Me. 239; *Kingsbury v. Moses*, 45 N. H. 222; *Berry v. Berry*, 17 N. J. L. 440; *Leatherbury v. Bennett*, 4 Har. & M. 392; *Ford v. Smith*, 5 Cal. 314; *Hinchman v. Whetstone*, 23 Ill. 185; *Adams v. Beale*, 19 Iowa, 61; *Wolf v. Foster*, 13 Kan. 116. Accordingly the payment may be substantiated either by producing the creditor's receipt and proving his signature, or by the oral deposition of the debtor. Though see *McGregor v. Bugbee*, 15 Vt. 731.

⁴ *Singleton v. Barrett*, 2 C. & J. 368.

⁵ *Smith v. Young*, 1 Camp. 439.

⁶ *Chicago R. R. v. George*, 19 Ill. 510.

⁷ *Teft v. Size*, 10 Ill. 432.

This exception has been extended (Taylor's Ev. § 177) to cases where, at the time of letting some premises to the defendant, the plaintiff had read the terms from pencil minutes, and the defendant had acquiesced in these terms, but had not signed the minutes. *Trewhitt v. Lambert*, 10 A. & E. 470; 3 P. & D. 676, S. C. See *Drant v. Brown*, 3 B. & C. 665; 5 D. & R. 582, S. C.; and *Bethell v.*

Blencowe, 3 M. & Gr. 119, where the court held that written proposals, made pending a negotiation for a tenancy, might be admitted without a stamp, as proving one step in the evidence of the contract; and when, upon a like occasion, a memorandum of agreement was drawn up by the landlord's bailiff, the terms of which were read over, and assented to by the tenant, who agreed to bring a surety and sign the agreement on a future day, but omitted to do so. *Doe v. Cartwright*, 3 B. & A. 326. See *Hawkins v. Warre*, 3 B. & C. 690; 5 D. & R. 512, S. C. And where, in order to avoid mistakes, the terms upon which a house was let were, at the time of letting, reduced to writing by the lessor's agent, and signed by the wife of the lessee, in order to bind him; but the lessee himself was not present, and did not appear to have constituted the wife as his agent, or to have recognized her act, further than by entering upon and occupying the premises; *R. v. St. Martin's, Leicester*, 2 A. & E. 240; 4 N. & M. 202, S. C.; and where lands were let by auction, and a written paper was delivered to the bidder by the auctioneer, containing the terms of the letting, but this paper was never signed either by the auctioneer or by the parties; *Ramsbottom v. Tun-*

also, of trover, for the conversion of a document, the document may be generally proved by parol description.¹ So it has been held that the inscription on a trunk tag can be proved without producing the tag;² that a highway can be proved to be such without producing the deeds or record establishing it;³ that the nature of clothes can be proved without producing the clothes;⁴ that the fact that a witness has been in prison can be proved without producing the record of conviction.⁵ Again, where the occupation of land is the point at issue, this fact may as well be shown by calling a witness to prove such occupation as by producing the lease.⁶ Thus in an English case,⁷ to prove a subsequent settlement, a pauper was asked whether he had not occupied and paid rent for a tenement. The opposite counsel interposed, and asked if he had held under a written contract. It appeared that he had, and it was then submitted that the writing must be produced, and that the original question could not be answered. But the court held that it might. Bayley, J., said: "The general rule is, that the contents of a written instrument cannot be proved without producing it. But although there may be a written instrument between a landlord and tenant, defining the terms of the tenancy, the fact of tenancy may be proved by parol without proving the terms of it." And Littledale, J. said: "Payment of rent as rent is evidence of tenancy, and may be proved without producing the written instrument."⁸ The reason for these exceptions is that when parties agree that a fact should be evidenced by oral as well as by written proof; or when, from the nature of the case, the proof must rest primarily in the recollection of the parties, which the written memoranda are ad-

bridge, 2 M. & Sel. 434. See *Ramsbottom v. Mortley*, 2 M. & Sel. 445, where, on the occasion of hiring a servant, the master and servant went to the chief constable's clerk, who in their presence, and by their direction, took down in writing the terms of the hiring, but neither party signed the paper, nor did it appear to have been read to them, parol evidence was received.

¹ *Jolley v. Taylor*, 1 Camp. 143; *Scott v. Jones*, 4 Taunt. 865.

² *Com. v. Morrell*, 99 Mass. 542.

³ *Woburn v. Henshaw*, 101 Mass. 193.

⁴ *Com. v. Pope*, 103 Mass. 440.

⁵ See *infra*, § 541.

⁶ See *Spiers v. Willison*, 4 Cranch, 398; *Hay v. Moorhouse*, 6 Bing. N. C. 52.

⁷ *R. v. Kingston upon Hull*, 7 B. & C. 611; 1 M. & R. 444.

⁸ See, also, *Twyman v. Knowles*, 13 C. B. 222.

missible only to refresh, then the existence of the written memoranda (there being no statute making it the exclusive method of proof) does not exclude the oral proof.

§ 78. It is also obvious that in most questions of genuineness and identity of documents, parol evidence must be received to prove such genuineness and identity. Except in case of certain self-proving documents, the genuineness of a document must be proved by witnesses before it can be let in; and, as is elsewhere seen, where the suit is tort for conversion, the document may be described by parol without notice to produce.¹ So it may be proved by parol (there being nothing in the certificate to such effect), that a person taking an acknowledgment was a justice of the peace, or other proper officer;² and that certain persons were partners, without producing the deed.³ So, as is elsewhere shown more fully, the fact of agency may be proved *primâ facie* by recognition of the principal.⁴ Nor, as to a parol agreement collateral to a written, does the rule apply.⁵ It must at the same time be remembered that the exceptions just noted are confined to cases where the parol evidence is evidential and not dispositive.⁶ If it go to the essence and substance of a contract, which contract the suit is brought to enforce, then the writing must be produced; as where a question of title is involved,⁷ or where the terms of a tenancy which is sued on are material.⁸

So when writing presupposes parol proof.

¹ *Scott v. Jones*, 4 Taunt. 865; *Doe v. Cartwright*, 3 B. & A. 326. *Infra*, § 1026.

Bucher v. Jarratt, 3 B. & P. 145; *How v. Hall*, 14 East, 275; *Darby v. Ald.* 590.

Ouseley, 1 H. & N. 1; *Com. v. Messinger*, 1 Binn. 274; *McLean v. Hertzog*, 6 S. & R. 154; *McGinnis v. State*, 24 Ind. 500; *Ross v. Bruce*, 1 Day, 100.

² *Rhoades v. Selin*, 4 Wash. 715; *Bank U. S. v. Benning*, 4 Cranch C. C. 81; *Shultz v. Moore*, 1 McLean, 520; *State v. McNally*, 34 Me. 210.

³ *Alderson v. Clay*, 1 Stark. R. 405.

⁴ *Infra*, §§ 1315-18.

⁵ *Reid v. Batte*, M. & M. 413; *Ramsbottom v. Tunbridge*, 2 M. & S. 434; *Vol. I.*

⁶ See *R. v. Castle Morton*, 3 B. & Ald. 590.

⁷ *Cotterill v. Hobby*, 4 B. & C. 465.

⁸ *R. v. Merthyr Tydvil*, 1 B. & Ad. 31. So, in the case of *Yorke v. Smith*, 21 L. J. Q. B. 53, where a bill of sale was inadmissible for want of a stamp,

it was held that oral evidence of the fact that there had been a sale was wrongly admitted. But, as we have seen, if a contract be established by oral evidence, it is for the adverse party to prove that it was in writing. In *R. v. Rawden*, 8 B. & C. 710, Bayley, J., said: "There can be no doubt

§ 79. Another important exception, based upon the admissions of the party charged, will be hereafter discussed.¹ It is enough for the present to say that a party may, by admitting the contents of a document, under certain limitations, relieve his opponent from its production.

§ 80. Cases may occasionally occur in which it is desirable to obtain information which is scattered through a vast number of public documents, the originals of which it would be highly impolitic as well as inconvenient to remove from their archives. In such cases it would be a perversion of justice not to admit sworn abstracts, or summaries of such documents, made by their proper custodians, in all cases where such summaries are based on and capable of being tested by exact calculation. In such cases they may be received.² This liberty, however, is not allowed as to bank books, which must at common law be produced in court or their absence accounted for,³ nor as to the books of a railroad company.⁴ Nor can the certificate of an officer having charge of public records, that a certain fact appears by the records, be received. The records themselves must be proved or exemplified.⁵ So where a mass of private documents to be inquired into is so great that they cannot possibly be mastered in court, then, whenever a result can be ascertained by calculation, the result of such calculation, subject to be tested by other expert witnesses, is admissible.⁶ And where bills of exchange have been, by certain parties, invariably drawn in the same way, this fact may be proved by one of their clerks without producing the bills.⁷ It is other-

that a party may, by keeping out of view a written instrument, make out by parol testimony a *primâ facie* case of tenancy, and that it then lies on the opposite party to rebut the *primâ facie* case so made out." Powell's Evidence, 4th ed. 63.

¹ *Infra*, § 1091.

² *Roberts v. Doxen*, Peake's Cas. 83; *Meyer v. Sefton*, 2 Stark. 276; *Henderson v. Hackney*, 16 Ga. 521; *Burton v. Driggs*, 20 Wall. 133; cited *infra*, §§ 82, 126, 177 a. See Johnson

v. Kershaw, 1 De G. & Sm. 264, ruling that to admissibility of the abstract it is necessary that the books should be ready to be produced if required.

³ *Ritchie v. Kinney*, 46 Mo. 298.

⁴ *McCombs v. R. R.* 67 N. C. 193.

⁵ *Wayland v. Ware*, 109 Mass. 248; but see *Weidman v. Kohr*, 4 Serg. & R. 174.

⁶ *Stephen's Ev.* p. 70, citing *Roberts v. Doxen*, Peake, 83; *Meyer v. Sefton*, 2 Stark. 276.

⁷ *Spencer v. Billing*, 3 Camp. 310.

wise, however, as to matters not the subject of calculation, or of precise statement.¹

§ 81. An instrument may be of so evanescent and transient a character that the incapacity of the party to produce it may be assumed without proof. In such case secondary evidence of its contents may be given without producing it, or giving evidence explanatory of its non-production. Thus, without production, or explanation of non-production, witnesses have been permitted to give parol evidence of the inscriptions on banners exhibited at public meetings,² of the writing, as we have seen on a trunk tag, at least for purposes of identification;³ and of the marks on clothes and other articles of personal property.⁴

So may parol evidence of things fleeting and unproduced.

§ 82. Monuments, tomb-stones, and other unmovable structures, may contain inscriptions which it is important to put in evidence. From the nature of the case such inscriptions may be proved either by photographs, or by copies duly proved.⁵ The same reasoning applies to

And so as to things which cannot be brought into court.

¹ *Topham v. McGregor*, 1 C. & Kir. 320. See *infra*, §§ 126, 506-515.

² *R. v. Hunt*, 3 B. & Ald. 566; *Sheridan's case*, 31 How. St. Tr. 679; *R. v. O'Connell*, Arm. & T. 235.

³ *Com. v. Morrell*, 99 Mass. 542. "The law generally requires the production of the highest evidence of which a thing is capable, and evidence is to be excluded which supposes still higher evidence behind in the possession or power of the party. But the rule is far from being universal. For example, it does not require that a supposed writer shall be called to prove his own handwriting, or that a person whose identity is to be proved shall be produced in court. The same is true in respect to an animal or any other object the identity of which is to be proved.

"The general rule is most frequently applied to writings, where proof is offered of their contents. The writing itself must be produced. But there are many exceptions as to writing. An inscription on a banner or flag carried about by the leaders of a riot may be proved orally. *The King v. Hunt*, 3 B. & Ald. 566. Or a direction contained on a parcel. *Burrell v. North*, 2 Car. & Kirw. 679. Or a notice to an indorser of a promissory note. *Eagle Bank v. Chapin*, 3 Pick. 180.

"In the present case, the tag referred to was not a document, but an object to be identified. The words written upon it served to identify it; and the court are of opinion that oral evidence was admissible for this purpose, and that it was not necessary to

⁴ *Com. v. Pope*, 103 Mass. 440. See *Com. v. Hills*, 10 Cush. 530.

⁵ *Jones v. Tarleton*, 9 M. & W. 675; *R. v. Fursey*, 6 C. & P. 84; *Doe v. Cole*, 6 C. & P. 360; *Haslam v. Cron*,

19 W. R. 969; *North Brookfield v. Warren*, 16 Gray, 171. See *Shrewsbury Peerage case*, 7 H. of L. Cas. 1. 16.

marks on trees,¹ to libels written on walls;² to placards posted on walls.³ It must appear, however, that the paper is so attached to the wall as to be irremovable.⁴ The same right has been extended to papers in a country which forbids their removal;⁵ in which case abstracts of such papers may be received.⁶

§ 83. It is competent for the law-making power to prescribe that marriage is only to be valid when solemnized with particular formalities; and in ordinary cases, on the principle *locus regit actum*, a marriage contracted without such formalities in a country where such formalities are exacted, cannot extra-territorially be held valid.⁷

Where this is the case the record of the marriage must be duly proved.⁸ A marked qualification exists, however, to this rule. When parties have lived together as man and wife in the United States, it will require very strong proof that their marriage was void for want of formality, in the place of solemnization, to justify with us an adjudication that it is invalid.⁹ With regard to parties marrying in their domicile of origin with the intention of settling in the United States, no American court would venture to pronounce the marriage void because the formalities prescribed by the *lex loci contractus* were not followed.¹⁰ *A fortiori* must

produce the tag. An inspection of the tag, with the written direction upon it, might have been more satisfactory to the jury than an oral description of it, and therefore might be regarded as stronger evidence; but the strength of evidence and the admissibility of evidence are different matters." Chapman, C. J., *Commonwealth v. Morrell*, 99 Mass. 544.

¹ *Ibid.*

² *Mortimer v. McCallen*, 6 M. & W. 67.

³ *Bruce v. Nicolopulo*, 11 Ex. 133. See *Bartholomew v. Stephens*, 8 C. & P. 728.

⁴ *Jones v. Tarleton*, 9 M. & W. 675.

⁵ *Alivon v. Furnival*, 1 C., M. & R. 277; *Boyle v. Wiseman*, 10 Ex. R. 647; *Quilter v. Jorss*, 14 C. B. (N. S.) 747; *Hyam v. Edwards*, 1 Dall.

2; *Am. Life Ins. Co. v. Rosenagle*, 77 Penn. St. 507. *Infra*, § 108.

⁶ *Supra*, § 81.

⁷ See Whart. *Confl. of Laws*, § 127 *et seq.*; *Holmes v. Holmes*, 1 Abb. U. S. 526.

⁸ *State v. Horn*, 43 Vt. 20. See *State v. Wallace*, 9 N. H. 515; *Jackson v. People*, 2 Scam. 232; *Glenn v. Glenn*, 47 Ala. 204. See *infra*, § 653.

⁹ See Whart. *Confl. of Laws*, § 173 *et seq.*

¹⁰ On this point the following thoughtful opinion strikes the true line: "It is not disputed that in a case of this nature an actual marriage must be proved. Such evidence of cohabitation and reputation as would be sufficient in other civil actions, will not suffice where it is sought to fix upon the woman a charge of adultery. Addison on Torts, 698; 2 Greenl.

we repudiate the doctrine that the marriage abroad of domiciled citizens of the United States is void unless it was solemn-

Ev. 461; 1 Bish. Mar. & Div. § 442, 4th ed. But had the supposed marriage taken place in this state, evidence that a ceremony was performed ostensibly in celebration of it, with the apparent consent and coöperation of the parties, would have been evidence of a marriage, even though it had fallen short of showing that the statutory regulations had been complied with, or had affirmatively shown that they were not. Whatever the form of ceremony, or even if all ceremony was dispensed with, if the parties agreed presently to take each other as husband and wife, and from that time lived together professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding upon the parties, and which would subject them and others to legal penalties for a disregard of its obligations. This has become the settled doctrine of the American courts; the few cases of dissent or apparent dissent being borne down by a great weight of authority in favor of the rule as we have stated it. *Fenton v. Reed*, 4 Johns. 52; *Jackson v. Winne*, 7 Wend. 47; *Starr v. Peck*, 1 Hill, 270; *Rose v. Clark*, 8 Paige, 574; *Matter of Taylor*, 9 Paige, 611; *Clayton v. Wardell*, 4 N. Y. 230; *Cheney v. Arnold*, 15 N. Y. 345; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Pearson v. Howey*, 6 Halst. 12; *Hantz v. Sealy*, 6 Binn. 405; *Commonwealth v. Stump*, 53 Penn. St. 132; *Newbury v. Brunswick*, 2 Vt. 151; *State v. Rood*, 12 Vt. 396; *Northfield v. Vershire*, 33 Vt. 110; *Duncan v. Duncan*, 10 Ohio, N. S. 181; *Carmichael v. State*, 12 Ohio, N. S. 553; *State v. Patterson*, 2 Fred. 346; *Londonderry v. Chester*, 2 N. H. 268; *Keyes v. Keyes*, 2 Foster, 553; *Bashaw v. State*, 1 Yerg. 177; *Gris-*

ham v. State, 2 Yerg. 589; *Cheseldine v. Brewer*, 1 H. & McH. 152; *State v. Murphy*, 6 Ala. 765; *Potier v. Barclay*, 15 Ala. 439; *Dumaresly v. Fishly*, 3 A. K. Marsh. 368; *Graham v. Bennet*, 2 Cal. 503; *Case v. Case*, 17 Cal. 598; *Patton v. Philadelphia*, 1 La. An. 98; *Holmes v. Holmes*, 6 La. R. 463; *Hallett v. Collins*, 10 How. 174." *Cooley, J., Hutchins v. Kimmell*, 31 Mich. R. 130.

"It has been held in this state that the common law as it exists among us will be presumed to prevail in a foreign country in the absence of proof to the contrary; *Hugh, appellant*, 2 Doug. Mich. 515; *Crane v. Hardy*, 1 Mich. 56; and though it may be questionable if this doctrine is to be applied universally, it cannot be disputed that the reason of it is applicable to all marriages celebrated in Christian countries, in which it may be properly assumed that a general common law on the subject of marriage still prevails. *Whart. Conf. L.* § 171. And as has been well said, the inconvenience of adhering to more rigid rules in the proof of foreign marriages would, in a country so largely populated by immigrants as is ours, be peculiarly great, and put courts and litigants to useless trouble and expense in every instance. *Bish. Mar. & Div.* § 528, 4th ed. Polygamous and incestuous marriages celebrated in countries where they are permitted, are nevertheless treated as invalid here, because they are condemned by the common voice of civilized nations, which establishes a common law forbidding them; and the same reasoning which condemns them must sustain the marriages by mere consent which the common law permits and sanctions. *Whart. Conf. L.* § 180. And especially should this

nized with formalities requisite in the place of solemnization.¹ Even on the strictest view, the *judex fori* will presume, until the contrary be proved, that a marriage abroad was in conformity with the *lex loci contractus*.²

§ 84. Waiving, however, these considerations, as belonging more properly to another branch of jurisprudence, we may hold it to be a principle of private international law, as in force in the United States, that marriages may be proved by parol.³ That which the parties hold themselves out as being, they cannot ordinarily contest; and hence general reputation, in respect to their marriage, which reputation their conduct establishes, may be, with cohabitation, primary evidence of marriage. *A fortiori* is family reputation of marriage authoritative in such issues.⁴ The fact of cohabita-

be the case where the parties, after taking such steps abroad to constitute a marriage as would be sufficient under our laws, remove afterwards to this country, and in apparent reliance upon the marriage, and the protection our laws would give it, continue for many years to live together as husband and wife, recognizing, as there is every reason to believe they did, the validity and binding obligation of the marriage for all purposes." *Cooley, J. Hutchins v. Kimmell*, 31 Mich. R. 133.

¹ See Whart. Confl. of L. § 173 *et seq.*

² *Redgrave v. Redgrave*, 38 Md. 93. See fully, *infra*, § 1297.

³ Whart. Confl. of L. § 171; *Van Tuyl v. Van Tuyl*, 8 Abb. (N. Y.) Pr. N. S. 5; *S. C.* 57 Barb. 235; *Bissell v. Bissell*, 55 Barb. 325; *Physick's Est.* 2 Brewst. 179; *Guardians of the Poor v. Nathans*, 2 Brewst. 149; *Richard v. Brehm*, 73 Penn. St. 140; *Ill. Land Co. v. Bonner*, 75 Ill. 315; *Murphy v. Georgia*, 50 Ga. 150; *Campbell v. Gullatt*, 43 Ala. 57; *Dickerson v. Brown*, 49 Miss. 357. See *Omohundro's Est.* 66 Penn. St. 113.

⁴ See *infra*, § 211, 224. *Kay v.*

Vienne, 3 Camp. 123; *Birt v. Barlow*, 1 Doug. 174; *Read v. Passer*, 1 Esp. 214; *Doe v. Fleming*, 4 Bing. 266; *Goodman v. Goodman*, 28 L. J. Ch. 745; *Brower v. Browers*, 1 Abb. (N. Y.) App. 214; *Jewell v. Jewell*, 1 How. U. S. 219; *Crawford v. Blackburn*, 23 Wall. 175; *Senser v. Bower*, 1 Penn. R. 450; *Com. v. Stump*, 53 Penn. St. 132; *Barnum v. Barnum*, 42 Md. 257; *Physick's Est.* 2 Brewst. 179; *Guardians of the Poor v. Nathans*, 2 Brewst. 149; *Dickerson v. Brown*, 49 Miss. 357; *Evans v. Morgan*, 2 C. & J. 453; *Doe v. Fleming*, 4 Bing. 266. "Whenever the witness is shown to have derived his information from some assignable individual, it is excluded as hearsay. *Shedden v. Att. Gen.* 2 S. & T. 170. Following the principle laid down by Mr. Fraser (*Fraser on the Personal and Domestic Relation*, vol. 1, p. 207), Lord Redesdale, in a case in the house of lords (*Cunninghame v. Cunninghame*, 2 Dow, 511), held that repnte to raise presumption of marriage must be founded on general not singular opinion; a divided repnte is on such a subject no evidence at all. Here his lordship was speaking probably of Scotch marriages only;

tion as man and wife raises a presumption of a legal marriage; ¹ and this is particularly so after a long interval of time.² But such cohabitation must be continuous and consistent to sustain the presumption.³ The reputation, which is thus to be proved, may

for in the recent case of *Lyle v. Elwood*, 23 W. R. 157; L. R. 19 Eq. 98, Vice-Chancellor Hall said: "It cannot be contended that wherever there is evidence of repute on one side and the other, a marriage cannot be established." *Powell's Evidence*, 4th ed. 147.

"Marriage is a civil contract, *jure gentium*, to the validity of which the consent of parties able to contract is all that is required by natural or public law. If the contract is made *per verba de presenti*, though it is not consummated by cohabitation, or if it be made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage in the absence of all civil regulations to the contrary. 2 Greenl. Evid. § 460. Marriage is a civil contract which may be completed by any words in the present time, without regard to form. *Hantz v. Sealy*, 6 Binn. 405. The fact of marriage, then, may be proved and established by competent and satisfactory evidence. What kind of evidence is held to be satisfactory? Marriage may be proved in civil cases by reputation, declarations, and conduct of the parties, and other circumstances usually accompanying that relation. 2 Greenl. Evid. § 462. For civil purposes, reputation and cohabitation are sufficient evidence of marriage. *Senser et al. v. Bower et ux.* 1 Penn. Rep. 450. In all civil cases, involving merely the right of property, the fact of marriage may be proved by long continued cohabitation as man and wife. *Thorndell v. Morrison*, 1 Casey, 326. Both cohabitation and reputation are necessary to establish a presumption of marriage,

where there is no proof of actual marriage. *Commonwealth v. Stump*, 3 P. F. Smith, 132. Marriage is in law a civil contract, not requiring any particular form of solemnization before officers of church or state. *Ibid.* Unequivocal and frequent admissions of marriage, accompanied by long continued cohabitation and reputation, are frequently most satisfactory evidence of marriage. *Vincent's appeal*, 10 P. F. Smith, 228." *Mercur, J., Richard v. Brehm*, 73 Penn. St. 144.

See, also, *Fenno v. Fenno*, 1 Weekly Notes, 165.

¹ *Infra*, § 1297; *Cunningham v. Cunningham*, 2 Dow, 507; *Piers v. Piers*, 2 H. L. Cas. 337.

² *Campbell v. Campbell*, L. R. 1 Sc. App. 193; *Powell's Evidence*, 4th ed. 76.

³ "It is not a sojourn, nor a habit of visiting, nor even a remaining with for a time. None of these fall within the true idea of cohabitation as a fair presumption of marriage. Neither cohabitation nor reputation of marriage, nor both, is marriage. When conjoined, they are evidence from which a presumption of marriage arises. The legal idea of cohabitation is that which carries with it a natural belief that it results from marriage only. To cohabit is to live or dwell together; to have the same habitation; so that where one lives and dwells there does the other live and dwell always with him. The Scotch expression conveys the true idea, perhaps, better than our own — 'the habit and repute' of marriage. Thus, when we see a man and woman constantly living together, — where one is dwelling, there the other

be the reputation of either a neighborhood or of a family, and may be established by a single witness.¹ But proof of mere

constantly dwells with him, — we obtain the first idea or first step in the presumption of marriage; and we add to this that the parties so constantly living together are reputed to be man and wife, and so taken and received by all who know them both, we take the second thought or second step in the presumption of the fact of a marriage. Marriage is the cause, these follow as the effect. When the full thought contained in these words, cohabitation and reputation of marriage, is embraced, we discover that an inconstant habitation and a divided reputation of marriage carry with them no full belief of an antecedent marriage as the cause. The irregularity in these elements of evidence is at once a reason to think there is irregularity in the life itself the parties lead, unless attended by independent facts, which aid in the proof of marriage. Without concomitant facts to prove marriage, such an irregular cohabitation and partial reputation of marriage avail nothing in the proof of marriage. It is precisely in this respect that this case has no resemblance to *Vincent's Appeal*. Had that case rested on cohabitation and reputation alone, no marriage could have been inferred,—the ‘double life’ and divided reputation of marriage would have decidedly condemned the conclusion. But *De Amarelli's* conduct was marked by so many circumstances disclosing a true marriage, that when linked with the pure, unspotted character of *Catharine Evans*, her wife-like conduct, and the reputation of their marriage beginning with facts tending to prove marriage at the very outset, the evidence of marriage was complete; while the reasons ac-

counting for inconstant cohabitation were strong and peculiar.

“It is argued here that the meretricious intercourse, to be inferred from the early relations of these parties, ought not to forbid a conclusion that the marriage relation existed afterwards, and we are referred to (among others) the case of *Campbell v. Campbell*, *Law R. 1 Scotch Divorce and Appeal Cases*, before the house of lords. But no case better illustrates the true idea of cohabitation than it. *Mrs. Ludlow*, a young and comely woman, eloped with *Captain Campbell*. *Ludlow*, the husband, died within two or three years afterwards. *Captain Campbell* and his reputed wife went to America, and thereafter constantly lived together as man and wife, were so accepted and known in his regiment, and on his return to England were so received and recognized among all his relatives and acquaintances, including his relative, the *Earl of Breadalbane*, whose estate became the subject of controversy. They had children, who were baptized as theirs, and were accepted and received as legitimate offspring. Among other facts, *Captain Campbell* gave to her a general power of attorney, in which he named her as ‘his wife, *Eliza M. Campbell*, residing at *Mapleburgh* (his residence), near the city of *Edinburgh*. Thus they lived constantly together, moving from place to place together, always known and recognized as husband and wife, until his death, and after his death his son was recognized as heir in legal proceedings of *tailzie*. The evidence of cohabitation and general repute of marriage was most complete, said

¹ *Evans v. Morgan*, 2 C. & J. 453.

reputation, unsupported by that of cohabitation, is by itself insufficient to establish a marriage.¹

Lord Chancellor Chelmsford. The proof was so strong and overwhelming, it overcame the original meretricious relation, and afforded convincing evidence of a subsequent marriage by contract, all that is required by the Scottish law of marriage. In the case before us there is no such evidence, the case being left to rest upon a broken and irregular cohabitation, and a reputation whose weight lay on the side of single life. From the whole evidence we can draw no other conclusion than that Elizabeth Sithens was a kept mistress, and not a wife." Agnew, Ch. J., *Yardley's Estate*, 75 Penn. St. 211-213.

¹ See cases cited *infra*, § 205.

The following notes of rulings may be of use as bearing on questions of this class: Where the *lex fori* does not require record proofs, the testimony of a witness, present at the marriage, is *primâ facie* evidence to prove such marriage, and as such, if undisputed, is sufficient to convict. *Greenleaf on Ev.* §§ 461, 493; *State v. Kean*, 10 N. H. 347; *Warner v. Com.* 2 Va. Cas. 95; *Com. v. Putnam*, 1 Pick. 136; *Wolverton v. State*, 16 Ohio, 176; *R. v. Manwaring*, *Dears. & B.* 132; 7 Cox C. C. 192; *R. v. Craddock*, 3 F. & F. 837; *R. v. Hawes*, 2 Cox C. C. 432; 1 Den. C. C. 270.

In Maine, Pennsylvania, Delaware, Virginia, South Carolina, Georgia, Alabama, Indiana, Texas, and Ohio, as well as in England, the defendant's admissions as to a former marriage may be given in evidence to prove the fact of such marriage. *Cook v. State*, 11 Georg. 53; *State v. Lash*, 1 Harr. (N. J.) 380; *Cayford's case*, 7 Greenl. 57; *State v. Hodgskins*, 19 Maine, 155; *State v. Libby*, 41 Maine, 469; *Gorman v. State*, 23 Tex. 616;

Com. v. Murtagh, 1 Ashmead, 272; *Forney v. Hallacher*, 8 S. & R. 159; *Warner's case*, 2 Va. Cases, 95; *State v. Hilton*, 3 Rich. 434; *State v. Britton*, 4 McCord, 256; *R. v. Simmonsto*, 1 Car. & Kir. 164; *Wolverton v. State*, 16 Ohio, 173; *Langtry v. State*, 30 Alab. 536; *State v. Seals*, 16 Ind. 352; *Squire v. State*, 46 Ind. 459; *Carmichael v. State*, 12 Ohio State R. 553; *Cameron v. State*, 14 Alab. 546; *State v. Sanders*, 30 Iowa, 582; *Oneale v. Com.* 17 Grattan, 582. As to Kentucky, see *Robinson v. Com.* 6 Bush, 309. The same view is taken in Canada. *R. v. Creamer*, 10 Low. Can. R. 404. In California, as in other states, this is by statute. *Case v. Case*, 17 Cal. 598.

In Massachusetts, Minnesota, Connecticut, and New York, however, a contrary doctrine has been expressed. *Com. v. Littlejohn*, 15 Mass. 163; *State v. Armstrong*, 4 Minn. 335; *State v. Roswell*, 6 Connect. 446; *People v. Humphrey*, 7 John. 314; *Clayton v. Wardell*, 4 Comst. 230; *Galagan v. People*, 1 Parker C. C. 383. See *People v. McCormack*, 4 Parker C. C. 17; *Physick's Est.* 2 Brewst. 179.

But while cohabitation may be evidence of marriage, it cannot make a void marriage valid. *Williams v. State*, 44 Alab. 21 (*Safford, J.* 1870).

When the marriage was in a foreign country, such evidence, when made deliberately, has frequently been considered sufficient. *Cayford's case*, 7 Greenl. 57; *Truman's case*, 1 East P. C. 470; *R. v. Newton*, 2 M. & Rob. 503; 1 C. & K. 164; *Rigg v. Curgenvin*, 2 Wils. 399. See, *per contra*, *People v. Humphrey*, 7 Johnson, 314; *Weinberg v. State*, 25 Wise.

§ 85. An important distinction, however, is to be noticed between suits in which the legitimacy of children or the sanctity of the domestic relation is at issue, and those in which the effort is to impose on the defendant penalties attachable to an illegal marriage. In the first case we have in favor of the marriage the presumption of legitimacy,¹ as well as those of good faith,² and of regularity.³ In the second case we have against the marriage the presumption of innocence. We cannot, therefore, transfer the decisions in the last class of cases to the former. In this country the distinction is of peculiar interest. An emigrant lands on our shores with a wife whom he has married without the observance of those restrictions which the peculiar social condition of several European states has imposed. He rears children whom he acknowledges, and who claim after his death to inherit his estate.

370; *Bird v. Com.* 21 Grat. 800, holding that where the *lex loci contractus* required certain solemnities, such solemnities should be proved to have taken place; and although this goes too far, it is clear that without corroboration a confession is insufficient. *R. v. Flaherty*, 2 C. & K. 782.

It was held not enough to prove a marriage, that the defendant, about twenty years before the offence was committed, stated, when hiring a house, that he had a wife and child, and afterwards moved into the house with a woman whom he called *Miss Ham*, and with whom, for several years, he lived as his wife. *Ham's case*, 2 Fairf. 391; *State v. Roswell*, 6 Connect. 446.

In Massachusetts it is now provided by statute that circumstantial and presumptive evidence may be received to prove the fact of marriage. *Suppl. Rev. Stat.* 166-7, 184; *Com. v. Johnson*, 10 Allen, 196.

In Maryland it has been held, in deviation from the canon and common law, that a marriage contracted merely *per verba de præsenti*, is not

valid without some form of religious ceremony. *Denison v. Denison*, 35 Md. 361. See, however, for a more liberal view, *Barnum v. Barnum*, 42 Me. 251.

The right to prove marriages by parol is not affected by the statutes permitting parties to be called as witnesses. *Rockwell v. Tunncliffe*, 62 Barb. 408.

The same right exists in suits brought in an action by the wife for damages in causing her husband's death. *Lehigh R. R. v. Hall*, 61 Penn. St. 361. As against the parties their admissions of marriage can be used. *Carotti v. State*, 42 Miss. 344. A man holding a woman out as his wife is estopped, in a suit against him by tradesmen for necessities furnished to her, from repudiating the relationship. *Infra*, § 1151; *Johnston v. Allen*, 39 How. (N. Y.) Pr. 506.

That the declarations of an ancestor can be received to establish marriage, we will elsewhere see. See *infra*, § 203 *et seq.*

¹ *Infra*, § 1298.

² *Infra*, § 1248.

³ *Infra*, § 1297.

Here, the fact of marriage being conceded, come in two important presumptions to sustain the legitimacy of the children. The first is that all acts are presumed to be regular until the contrary appears. The second is that when the evidence is equally balanced, the courts, in all questions of legitimacy, will favor the hypothesis of matrimony.¹ On the other hand, if the emigrant in question has come to this country without a wife, marries here, establishes a home and family, and then is arrested here on the charge of bigamy, based on an alleged marriage in his native land; the fact of marriage, instead of being aided by presumptions which in a doubtful case would turn the scales in its favor, has to encounter presumptions which in a doubtful case will turn the scales against it. The defendant's second marriage is not contested, and is looked on with peculiar favor by the judicial polity of a country such as this, which seeks to encourage family growth.² But what is much more important, the fact of the first marriage is the gist of the prosecution's case, and to it applies eminently the maxim, that the charge of guilt, to justify a conviction, must be made out beyond reasonable doubt. Hence we find courts which are ready, when a marriage is to be adjudicated on its civil relations, to regard the husband's own admissions as proof of the fact, shrinking from this conclusion, when the object is to sustain a criminal prosecution against him for bigamy. Confessions are only authoritative, it is well argued, when there is clear proof of the *corpus delicti*; ³ and here the *corpus delicti* is the alleged first marriage. How is this to be "clearly proved," independent of the defendant's confession? Now, in view of the issue being criminal, we can easily understand how a court should say, as some courts have said: "The *lex loci contractus* prescribes certain solemnities as necessary to constitute the formalities of marriage, and therefore, in view of the maxim, '*locus regit actum*,' we must hold that any other proof of the fact of marriage is but secondary and is not to be received." Had the first wife been brought to this country, and here acknowledged, the case would

¹ See *Patterson v. Gaines*, 6 How. U. S. 550; *Shaffer v. State*, 20 Ohio R. 3. See *supra*, §§ 1248, 1297-8.

² See Wh. Con. of L. § 150; Wh. Cr. Law, § 2630.

³ See Whart. Cr. L. § 683; and see *R. v. Flaherty*, 2 C. & K. 782.

have been different. But when the prosecution rests simply on a technical first marriage, it is not inconsistent in courts, who recognize the validity of a consensual marriage, to hold that such technical first marriage should, in a criminal issue, in order to be made out beyond reasonable doubt, be proved in the way the *lex loci contractus* prescribes, and that secondary evidence should only be received when the presumptions of the *lex loci contractus* are peculiarly onerous, or when the primary evidence cannot be obtained.¹

§ 86. It is true that when the *lex fori* recognizes a consensual marriage as valid, the proof of a consensual marriage will sustain an indictment for bigamy. But the proof must establish the marriage beyond reasonable doubt. Mere confessions in a matter of this kind, where talk is often so careless, and words used in such varied significations, require a peculiarly large measure of that scrutiny which all confessions invoke. Of course, if a man, after a consensual marriage in a country where consensual marriages are invalid, comes with his wife to a country where they are valid, and there lives with her as her husband, then this is, at least, a validation of the former invalid marriage. But if he leave her abroad, without such validation, then a court in our own land, should a prosecution be brought against him for bigamy, may well refuse to be satisfied by mere admissions, or even by proof of cohabitation. There must be proof, to sustain the allegation of the indictment, of the solemnization of the first marriage. We may not insist upon proof that all the prescriptions of the *lex loci contractus* were complied with; for these are sometimes so contrary to our national policy, and so repugnant to the common law of Christendom, that there may be cases in which we may refuse to recognize them as limiting an international institution such as marriage really is. But while we may thus occasionally dispense with these formalities, we must, nevertheless, insist, when a foreign marriage is made the basis of a criminal prosecution in our own land, that such foreign marriage should be proved by showing that in such marriage there was a *bonâ fide* matrimonial contract by parties capable of

¹ See *State v. Horn*, 43 Vt. 20; *v. Com.* 21 Grat. 800. See, in a civil *People v. Humphrey*, 7 Johns. 314; *issue*, *Harris v. Cooper*, 31 Up. Can. *Weinberg v. State*, 25 Wisc. 370; *Bird Q. B.* 182.

contracting, followed by cohabitation. To establish the contract, the foreign registry, sustained by proof of the foreign law, is the best evidence. For this, however, the testimony of witnesses to the fact may be substituted, supposing the registry cannot be obtained. And this holds good even where the marriage was not, in matters purely artificial, in compliance with the law of the place of solemnization, if it was a valid marriage by the common law of Christendom, — *i. e.* if the parties were capable of contracting, and the contract was an exclusive sexual union for life.¹

§ 87. The testimony of a witness, present at the marriage, is admissible and adequate proof, unless the law requires official evidence.² When the marriage is extra-territorial, the officiating clergyman, according to American cases, may not only prove the marriage, but the foreign law under which it was solemnized.³ But in England, unless a witness be an expert, he cannot prove in this respect the foreign law.⁴ In domestic marriages, the fact that a justice of the peace or clergyman performed the ceremony, is proof that he professed and was generally understood to have the authority so to do.⁵ Whether the wife can be a witness is hereafter discussed.⁶

III. DIFFERENT KINDS OF COPIES.

§ 89. Originals, by the Roman law, are styled *exemplaria*, *autographa*, *archetypa*. Copies are called by the earlier Classifica-
tion. jurists *exempla*, *apographa*, but afterwards were sometimes mentioned as *copiæ*, *translatum*, *transcriptum*, *exemplar*, *exemplatio*, *duplarium*. Copies were divided into certified, *copiæ authenticæ*, *vidimatae*, and simple, *simplices*, *incertæ*, *vagæ*. The first, to which the certificate *Vidimus* (hence *vidimatae*) was attached, were regarded, when certified by the proper

¹ Whart. Cr. Law, 7th ed. § 2630.

⁴ *R. v. Povey*, 6 Cox C. C. 83; S.

² *R. v. Manwaring*, D. & B. C. C. 132; 7 Cox C. C. 192; *State v. Kean*, 10 N. H. 347; *Warner v. Com.* 2 Va. Ca. 95; *Com. v. Putnam*, 1 Pick. 136; *Wolverton v. State*, 16 Ohio, 176.

P., *R. v. Smith*, 14 Up. Can. Q. B. 565; but see *Wh. Con. of L.* § 775, and *Sussex Peerage case*, there cited; and see fully, *infra*, §§ 300-4.

³ *Bird v. Com.* 21 Grat. 800; *Am. Life & Trust Co. v. Rosenagle*, 77 Penn. St. 507; *State v. Abbey*, 29 Vt. 60.

⁵ *Bird v. Com.* 21 Grat. 800; *State v. Abbey*, 3 Williams (29 Vt.), 60.

⁶ See *infra*, §§ 421-432.

officials, as equivalent to originals. In many of the ancient record offices, the originals were placed by themselves in particular chests or caskets, while the copies were inscribed in books, called *instrumenta volumina*, *panchartae*, *chartularia*, *antiquaria*, *regestraria*, *libri copiales*. To these books were assigned the authority of originals. A private copy is by the Roman law not evidence. The Roman practice makes to this the following exceptions:—

1. When the original has been maliciously destroyed by the opposite party.

2. When in no other way could the information given by the instrument be obtained.¹

By the Decretals (cap. 16, x. II. 22) an exemplification by the proper authority is evidence; and in the practice of the modern Roman law, a notary, as to matters within his range, is such an authority.²

§ 90. When we come to copies of written instruments, in view of the fact that there are degrees of accuracy as widely distinguished as is written testimony from oral; we cannot escape the conclusion that a party who, having in his power evidence of a higher degree, throws much suspicion on his case if he withhold such higher evidence, and offer that which is not only lower, but necessarily inferior as a means of expressing truth.³ Hence, it has been held that if an exemplification of a lost record or deed be obtainable, a party will not be permitted to prove such deed or record by memory of

¹ See Weiske, *Rechtslex in loco*.

² See Weiske's *Rechtslex*, xi. 654. By our new law, certified copies by the proper officer may be: "1. Exemplifications under the great seal; 2. Exemplifications under the seal of the court where the record is; 3. Office copies, *i. e.* copies made by an officer appointed by law for the purpose." Best's Evidence, § 486; Taylor's Ev. § 1379.

³ *Supra*, § 71; *infra*, § 133; *Liebman v. Pooley*, 1 Stark. 167; *Renner v. Bank*, 9 Wheat. 581; *Winn v. Patterson*, 9 Pet. 663; *Barney v. Schneider*, 9 Wall. 248; *Hamilton v. Van Swea-*

ringen, Add. (Pa.) 48; *Stevenson v. Hoy*, 43 Penn. St. 191; *Coman v. State*, 4 Blackf. 241; *Speyer v. Sterne*, 2 Sweeny, 516; *Williams v. Waters*, 36 Ga. 454; *Evans v. Bolling*, 8 Port. (Ala.) 546. See *Mortimer v. McCallan*, 6 M. & W. 58, 69; *Brewster v. Sewell*, 3 B. & Ald. 296; *Brown v. Providence, Warren & Bristol Railroad Co.* 5 Gray, 35; *Everingham v. Roundell*, 2 Mood. & Rob. 138; *Ryves v. Braddell*, Irish Term R. 184; *Holland v. Reeves*, 7 C. & P. 36; *Morris v. Vanderen*, 1 Dall. 64; *Winn v. Patterson*, 9 Pet. 633.

witnesses.¹ So it has been ruled that a party who has control of a certified copy of a lost will, will not be permitted to prove the will orally.² So when a notarial copy of a note is in a party's hands, he will not be permitted to prove the note by parol.³ So a party cannot prove a record by parol when he has an opportunity to obtain an exemplification.⁴ The principle is that where a particular kind of copy is by law especially directed and guarded, such a copy is to be regarded as so far primary as to exclude, so long as it can be produced, mere recollections by unofficial persons, of what is registered in the copy.⁵ But unless a particular kind of copy is, by either statute or common law, or by peculiar reasons of policy, made primary, the fact that it is withheld, however much it may detract from the credit of a party,⁶ does not preclude him from offering other secondary evidence. As will hereafter be seen, the testimony of a deceased witness can be proved either by notes of a short-hand writer sworn to by him, or by the recollection of a witness; and neither can exclude the other.⁷ So it has been even argued that a party is not excluded from proving a lost document, by the fact that he has possession of a written copy of such document which could be verified.⁸ It is certainly plain that he will not be precluded from offering an unofficial copy of a lost note by the fact that a notarial copy could have been at one time obtained by him; he not having it in his power to obtain such copy at the trial.⁹

¹ *U. S. v. Britton*, 2 Mason, 464; *Lowry v. Cady*, 4 Vt. 504; *Cornett v. Williams*, 20 Wall. 226 (quoted *infra*, § 135); *Hilts v. Colvin*, 14 Johns. 182; *Platt v. Hauser*, 27 Mich. 167; *Ellis v. Huff*, 29 Ill. 449; *Harvey v. Thorpe*, 28 Ala. 250. See *Thurston v. Slatford*, 1 Salk. 285; *Macdougall v. Young*, Ry. & M. 392; *Doe v. Ross*, 7 M. & W. 106.

² *Ill. Land Co. v. Bonner*, 75 Ill. 315.

³ *U. S. v. Britton*, 2 Mason, 464.

⁴ *New York Co. v. Richmond*, 6 Bosw. 213; *Livingston v. White*, 30 Barb. 72; *Higgins v. Reed*, 8 Iowa, 298; *Edwards v. Edwards*, 11 Rich. (S. C.) 537.

⁵ See *R. v. Wyld*, 6 C. & P. 380.

⁶ That it does so, see *infra*, § 1266; and see *Shoenberger v. Hackman*, 37 Penn. St. 87.

⁷ See *infra*, § 177.

⁸ *Doe v. Ross*, 7 M. & W. 102; *Jeans v. Wheeldon*, 2 M. & Rob. 486; *Brown v. Brown*, 1 Sw. & Tr. 32; *Johnson v. Lyford*, L. R. 1 P. & D. 546; *Carpenter v. Dame*, 19 Ind. 129. See, however, *contra*, *Dennis v. Barber*, 6 Serg. & R. 420; *Stevenson v. Hoy*, 43 Penn. St. 191; *Ill. Cent. Land Co. v. Bonner*, 75 Ill. 315; *Merritt v. Wright*, 19 La. R. 91; *Harvey v. Thorpe*, 28 Ala. 250; and *infra*, § 135.

⁹ *Renner v. Bank*, 9 Wheat. 582. See *supra*, § 71.

§ 91. Whether photographs of writings may in any view be treated as primary evidence may be doubted, and it is clear that when an original is required, the original must be produced. The merits, the defects, and the value of photographs and photographic copies, in other relations, will be hereafter discussed.¹

§ 92. A printed copy of a manuscript is secondary to the manuscript, which must be produced or accounted for.² But the several printed copies produced by a single impression, and issued in a single edition, come in *pari passu*, and though secondary evidence of the original, are primary as to each other.³

§ 93. Strictly speaking, a press copy is secondary to the original document from which it is taken.⁴ Such a copy is receivable on the loss of the original.⁵ At the best, however, it continues secondary. Hence it has been held that a copy can be produced from a press copy of a lost writing without producing the press copy.⁶ But though a press copy is thus secondary, it may be used as a means of determining the identity and genuineness of an instrument.⁷

¹ See *infra*, § 676.

² *R. v. Watson*, 32 How. St. Tr. 82. See *supra*, § 76.

³ *R. v. Ellicombe*, 5 C. & P. 522; *R. v. Kitson*, Pearce & D. 187; *R. v. Doran*, 1 Esp. 129. See *supra*, §§ 71, 72.

⁴ *Nodin v. Murray*, 3 Camp. 228; *Chapin v. Siger*, 4 McL. 378; *Marsh v. Hand*, 35 Md. 123. See *supra*, §§ 71, 73, 74; *infra*, § 133. See *Merritt v. Wright*, 19 La. An. 91. "The fact that a party keeps letter-press copies of letters does not obviate the necessity of producing the originals, or of laying the foundation in the ordinary and usual way for secondary evidence. For this error the judgment should be reversed, and a new trial granted, costs to abide the event." *Earl, C., Foot v. Bentley*, 44 N. Y. 171. See *infra*, § 133.

⁵ *Cameron v. Peck*, 37 Conn. 555.

⁶ *Goodrich v. Weston*, 102 Mass. 362, cited at large, *supra*, § 72.

⁷ "The court admitted press or machine copies of certain letters, purporting to have been written by the defendant, to be read to the jury. These, we think, were competent on two grounds. Independently of proof that the originals were in the handwriting of the defendant, the copies were admissible as documents in his possession, and to which he had constant access. They, therefore, furnished room for the inference that he was acquainted with their contents, and affected him with an implied admission of the statements contained in them. This is the ordinary rule of law applicable to papers found in the possession of a party. 1 Greenl. Ev. § 198, and cases cited. Evidence of a precisely similar character was ad-

§ 94. *Examined copies* are, in England, resorted to as the most usual mode of proving records. To enable such a copy to be read, it must be verified by a witness, who will swear that he has compared the copy tendered with the original, either directly, or through a person employed to read

Examined
copies
must be
compared.

mitted without objection in *Commonwealth v. Eastman*, 1 Cush. 189, 195. Nor are we able now to see any valid reason for excluding it. But upon another and distinct ground we are of opinion that the evidence was admissible. The press copies, as they were called, were in fact proved to have been in the handwriting of the defendant. They were, in truth, a part of the original letters as written by him, transferred by a mechanical pressure to other sheets. But such transfer did not destroy the identity of the handwriting as shown on the impression, or render it unrecognizable by persons acquainted with its characteristics. These to a considerable extent it must necessarily still retain, so that a person having adequate knowledge could testify to its genuineness with quite as much accuracy as if he had before him the original sheets on which the letters were first written. Writings thus transferred are not unlike written documents which have been defaced or partially obliterated by exposure to dampness, rough usage, or the wasting effect of time. Such papers may not possess all the distinctive features of the original handwriting, but their partial destruction or obliteration will not render them inadmissible as evidence, if duly identified by testimony. A press copy, it is true, might furnish a very unsatisfactory standard of comparison by which to determine whether another paper, the handwriting of which was in controversy, was written by the same person, because the mechanical process

to which it had been subjected in transferring it would, by spreading the ink and blurring the letters, necessarily somewhat affect its general resemblance. For this reason it was rejected, when offered for such purpose, in *Commonwealth v. Eastman*, 1 Cush. 217. But although incompetent as a means of comparison by which to judge of the characteristics of a handwriting which is in dispute, it might still retain enough of its original character to be identified by a witness, when its own genuineness was called in question. Such in effect was the nature of the testimony offered at the trial, although the mode of putting the inquiry to the witness was defective and irregular. Strictly, he should have been asked if the letters shown to him appeared to be in the handwriting of the defendant; then by proving that they were press copies, it would follow that the letters from which the impressions were made were his also. The defect was in so framing the question as to elicit the opinion of the witness concerning the handwriting, and the necessary consequence of that opinion in the same answer. But the substance of the evidence was clearly competent. It was accompanied by proof of due effort on the part of the government to procure and produce the original letters, and was thus brought within the principle and reason of the rule on which evidence, in its nature secondary, of the contents of written papers is held to be admissible." *Bigelow, C. J., Commonwealth v. Jeffries*, 7 Allen, 561.

the original.¹ The work must be done by persons who understand the characters and language of the document.² The practice in making such copies is either for one person to compare the copy line for line with the original, or, what is in one respect more accurate, for one person, after the copy is made, to read the original, and the other, holding the copy, to mark the correspondence. In such case it has been held not enough to produce only the witness who held the copy, since he only knew at second hand the original. The better course, it is ruled, is either for the comparing witnesses to change hands, so that the listening witness might in his turn become the reading witness, or, for either of the two, after the process of comparing, to read the paper with the original, and thus to qualify himself to speak directly as to accuracy.³ In prior cases it was held enough to call one of the persons engaged in the comparing process.⁴ A copy made by a witness, though without comparison, is undoubtedly evidence of a high grade, if he testifies to its accuracy; the more cautious course is to add comparison by another's aid.⁵ The copy, to be admissible, must be complete; and it will be excluded if it give abbreviations of that which in the original is given at length.⁶ It need scarcely be added that the record copied must be shown to have been in its proper office when copied.⁷

§ 95. Exemplifications of the record of a court, under the seal of the court, are not in England common, the usual course being, when the issue is raised as to the existence of a record which does not belong to the same

¹ *McNeil v. Perchard*, 1 Esp. 264; *Gyles v. Hill*, 1 Camp. 471, n.; *Fyson v. Kemp*, 6 C. & P. 71; *Rolf v. Dart*, 2 Taunt. 51; *R. v. McDonald, Arm.*, M. & O. 112; *Taylor's Ev.* § 1389.

² *Crawford Peerage case*, 2 H. L. Cas. 544.

³ *Slane Peerage case*, 5 Cl. & F. 42. See *Whitehouse v. Bickford*, 29 N. H. 471; *Catlin v. Underhill*, 4 McLean, 199; *Amer. Life Ins. Co. v. Rosenagle*, 77 Penn. St. 507.

⁴ *Rolf v. Dart*, 2 Taunt. 52; *Gyles v. Hill*, 1 Camp. 471, note. See *Best's Evidence*, § 486.

⁵ "The general rule of the law upon this subject requires that a copy, in order to be admitted as secondary evidence, should be proved by some one who has compared it with the original. 1 Starkie on Ev. 270, 9th Amer. ed.; *Kerns v. Swope*, 2 Watts, 75." *Sharswood, J.*, *McGinniss v. Sawyer*, 63 Penn. St. 267.

⁶ *R. v. Christian*, C. & M. 388; *Com. v. Trout*, 76 Penn. St. 379.

⁷ *Adamthwaite v. Synge*, 1 Stark. R. 183.

court, to obtain an exemplification under the great seal; which cumbrous process consists in the removal of the record of such other court into the court of chancery; and then an exemplification of the record is transmitted by *mittimus* out of chancery to the court where the trial is had, and in which proof of the record is needed.¹ A record must be certified to as a whole, and not in loose and detached parts.²

§ 96. In the United States, the practice, so far as concerns the relations of the particular states, was fixed by the Act of Congress of May 26, 1790, which provides that ^{In the U. S. made so by statute.} "the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States, by the attestation of the clerk, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken."³

¹ Taylor's Evidence, § 1380, citing Winsor v. Dunford, 12 Q. B. 693. See Dunham v. Chicago, 55 Ill. 357.

The mode of certifying records will be hereafter more fully discussed. See *infra*, § 824 *et seq.* It has been ruled in Massachusetts that where a certified copy of a record is partly printed and partly written, but has the clerk's certificate at the end of the written part only, whether the certificate applies to the whole roll or to the written part alone is a question of fact to be determined by examination and inspection of the papers. Goodrich v. Stevens, 116 Mass. 170. "A portion of the judgment roll offered by the plaintiff," said Endicott, J., "was printed, and a portion was in writing. The only objection to its admission was, that the certificate of the clerk applied to the written part only. This is a matter to be determined by exam-

ination and inspection of the papers. No question of law is involved in the decision, and it is apparent that the certificate was intended to and does extend to the whole judgment roll. The ruling of the presiding judge admitting it in evidence was correct. Knapp v. Abell, 10 Allen, 485; 1 Greenl. Ev. §§ 504, 506." Endicott, J., Goodrich v. Stevens, 116 Mass. 170.

² *Susquehanna R. R. v. Quick*, 68 Penn. St. 189. See *infra*, § 824.

³ See as to rulings as to the character of exemplifications under this statute, *infra*, § 824.

As to foreign records, the practice is thus stated: "We are of the opinion that the record offered in evidence should have been received. There can be no question of its competency. Strictly speaking, it is the best, and only original, evidence of the facts

§ 97. Although by the terms of the original statute, it is limited to state courts, it is extended, by the Act of March 27, 1804,

recited in it. A verified copy of the record, although admissible, is still only secondary evidence. Anciently, the record itself was offered when the cause requiring it was in the same court where the record was; and an exemplification of it was used when the cause was pending elsewhere. Now, however, in most, if not all of the courts in this country, copies of the record properly authenticated are received as sufficient in all cases; a practice said to be established either by immemorial usage or early statutes to that effect. *Knox v. Silloway*, 10 Me. 201; *Vose v. Manly*, 19 Me. 331; *Brooks v. Daniels*, 22 Pick. 498; *Day v. Moore*, 13 Gray, 522; *Ladd v. Blunt*, 4 Mass. 402; *Commonwealth v. Phillips*, 11 Pick. 28; and see 1 Greenl. on Ev. § 501, and notes. So that in this case the defendant was entitled to put in evidence either the record itself or a copy of it, at his option.

“The judge presiding, however, excluded the original record, under the supposition that, if admitted, it must go to the jury room with the papers of the case. This, we think, was erroneous. It was not necessary that the jury should have it. They could get no aid from an inspection of it if in their possession. The construction of it was for the court. Where a domestic record is put in issue it is to be tried by the court, notwithstanding it is a question of fact. If a foreign judgment, the issue is to be tried by a jury. The reason is, that the court, in the case of a domestic judgment, can have an inspection of the record itself, but if it is a foreign judgment it can only be proved by a copy, the veracity of which is a question of fact for the jury. *Hall v.*

Williams, 6 Pick. 232; Greenl. on Ev. and notes, before cited.” *Peters, J., Sawyer v. Garcelon*, 63 Me. 25.

On the general bearings of the constitutional provision, *Thompson, C. J.*, in the supreme court of Pennsylvania, thus speaks: “The Constitution of the United States, Art. 4, § 1, declares ‘that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state,’ and that Congress may prescribe a mode of authentication of such records. Accordingly by Act of the 26th of May, 1790, Congress prescribed that the said records and judicial proceedings authenticated as therein directed, ‘shall have such faith and credit given them in every court within the United States, as they have by law or usage in the courts from whence such records are or shall be taken.’

“Now the effect of the record of the case in hand being, as already said, properly authenticated according to the act of Congress, is to give the same conclusiveness here which it has in the State of New York. Without it were shown that the court which rendered the judgment was a court of special or limited jurisdiction, no averment can be made against the conclusiveness of its record. This is not pretended. We are therefore bound to regard what it has adjudicated upon as incapable of contradiction collaterally here, because that would be the effect upon the record there.

“The judgment roll of the court in New York recites most distinctly that the parties were personally summoned, and that after trial and verdict, judgment was entered on the verdict against them for the amount of the verdict and costs. This recital shows

to the "public acts, records, office books, judicial proceedings, courts, and officers of the respective territories of the United States, and countries subject to the jurisdiction of the United States," and it has been held that while the statute is not formally applicable to the federal courts, yet exemplifications of the records of such courts will be regarded as admissible when the prescriptions of the statute are followed.¹ At the same time it must be remembered that records of a federal court, certified to by the clerk of the court, under the seal of the court, without the certificate of the chief judge, may be received by other federal courts.² And so may such records when so proved in state courts.³ That a record is certified to by a seal of court is evidence that the court is one of record.⁴

§ 98. While a state court is required to accept an exemplification of the records of the court of another state, when proved in conformity with the Act of 1790, yet this does not preclude a state from authorizing records

Federal statute does not exclude other proofs.

conclusively the jurisdiction of the parties in that suit, of which the defendant was one; and it cannot be contradicted or averred against in an action on the record without denying the effect which, by the Constitution and act of Congress, it is entitled to have conceded to it." *Wetherill v. Stillman*, 65 Penn. St. 114.

"As to the jurisdiction by the court in New York of the cause of action, that is concluded by the legal maxim always applicable to judicial proceedings, 'Omnia præsuntur rite esse acta.' It must be presumed that the court has exercised jurisdiction legally; a contrary presumption would necessarily imply usurpation on the part of the court. To require proof of jurisdiction when the court is a court of general jurisdiction, would be to countenance the idea of the possibility of usurpation on the part of the court, and would overthrow at once the conservative maxim alluded to. The conclusiveness of such records as this is sustained by many decisions. *Baxley*

v. Linah, 4 Harris, 241; *Hampton v. McConnel*, 3 Wheat. 234; *Mills v. Duryee*, 7 Cranch, 481; *Westerwelt v. Lewis*, 2 McLean, 511; 2 Amer. Lead. Cases, 774. Neither, therefore, as to the jurisdiction of the person nor the subject matter of the action, was the affidavit effectual to raise an inquiry into the judgment, and the court below very properly granted judgment against the defendant for want of sufficient affidavit of defence." *Thompson, C. J., Wetherill v. Stillman*, 65 Penn. St. 114.

¹ *Tooker v. Thompson*, 3 McLean, 94; *Bnford v. Hickman*, Hemp. 232. See *Mason v. Lawrason*, 1 Cr. C. C. 190.

² *Murray v. Marsh*, 2 Hayw. 290; *U. S. v. Wood*, 2 Wheel. C. C. 326; *Redman v. Gould*, 7 Blackf. 361; *Womack v. Dearman*, 7 Port. 513.

³ *Adams v. Way*, 33 Conn. 419; *English v. Smith*, 26 Ind. 445. Though see *Tappan v. Norvell*, 3 Sneed, 570.

⁴ *Smith v. Redden*, 5 Harring. 321.

of other states to be received in evidence upon proof of less stringency, or by common law proof. The act does not say that records shall only be received upon such proof; it merely says that when verified by such proof they shall be received.¹ A federal court sitting in a particular state will accept the proof prescribed in such state of infra-territorial records.² And it has been held that a state court may receive records of federal courts upon an ordinary exemplification.³

§ 99. The records under the purview of this statute, it has been held,⁴ are those of courts of record, in the common law sense of the term; and do not, therefore, include the proceedings of municipal magistrates or justices of the peace who keep no records;⁵ though it is otherwise when the justice of the peace holds a court of record, and is obliged by statute to keep a record of his proceedings;⁶ or when his proceedings are certified by him to the county court, and there verified under the act of Congress.⁷ But the English conceit, that a court of equity is not a court of record, has not been accepted by us; and hence, the proceedings of courts of chancery, as well as of orphans' courts and courts of probate, are

¹ *State v. Stade*, 1 D. Chipm. 303; *Raynham v. Canton*, 3 Pick. 293; *Kingman v. Cowles*, 103 Mass. 283; *Pepoon v. Jenkins*, 2 Johns. Cas. 119; *Biddis v. James*, 6 Binn. 321; *Ohio v. Hinchman*, 3 Casey (Penn.), 485; *Povall, ex parte*, 3 Leigh, 816; *Ellmore v. Mills*, 1 Hayw. 359; *English v. Smith*, 26 Ind. 445; *Railroad Bank v. Evans*, 32 Iowa. 202; *Orlway v. Conroe*, 4 Wise. 45; *Hackett v. Bonnell*, 16 Wise. 471; *Lewis v. Sutliff*, 2 Greene (Iowa), 186; *Parke v. Williams*, 7 Cal. 247; *Goodwyn v. Goodwyn*, 25 Ga. 203; *Karr v. Jackson*, 28 Mo. 317; *Pryor v. Moore*, 8 Tex. 250. See *Porter v. Bevil*, 2 Fla. 528. And see, on general question, *Escott v. Mastin*, 4 Moo. P. C. 130; *Northam v. Latouche*, 4 C. & P. 140.

² *Mewster v. Spalding*, 6 McLean, 24.

³ *Womack v. Dearman*, 7 Port. 513.

⁴ See *Brightly's Federal Digest*, 265.

⁵ *Robinson v. Prescott*, 4 N. H. 450; and see *Mahurin v. Bickford*, 6 N. H. 567; *Warren v. Flagg*, 2 Pick. 448; *Thomas v. Robinson*, 3 Wend. 267; *Snyder v. Wise*, 10 Barr, 157; *Silver Lake Bk. v. Harding*, 5 Ohio, 545; *Trader v. McKee*, 2 Ill. 558; *Gay v. Lloyd*, 1 Green (Iowa), 78.

⁶ *Smurkweather v. Loomis*, 2 Vt. 573; *Blodget v. Jordan*, 6 Vt. 580; *Brown v. Edson*, 23 Vt. 435; *Bissell v. Edwards*, 5 Day, 363; *Belton v. Fisher*, 44 Ill. 32; *Draggoot v. Graham*, 9 Ind. 212.

⁷ *Hade v. Brotherton*, 3 Cranch C. C. 594.

to be proved as the act of Congress prescribes.¹ The act, it should be remembered, does not authorize exemplifications of merely private writings, though filed in court.² Nor does it extend to judgments of the courts of the late Confederate States.³ It covers, however, certificates of naturalization.⁴

§ 100. The clerk, who under the act is to attest the record, must be the chief clerk of the court, or of its successor, to whom the care of its records, in case of its expiration, is committed. The certificate of an under clerk, or of a deputy or substitute, is inadequate.⁵ When the offices of judge and clerk are united (as in the case of surrogates), the judge acts as clerk in attesting the proceedings, and then his certificate as judge to the attestation will be sufficient.⁶ The appending of the certificate of a cumulative clerk, however, does not vitiate the exemplification.⁷ When there is no seal to the court, this should be explained in the certificate of either clerk or judge.⁸ If there be a seal, it must be attached to the *record*; it is not enough to attach it to the certificate.⁹ The certificate must be by the "chief" or "presiding" judge of the court; it is not enough if it should issue from an associate judge,¹⁰ nor from

Statute
must be
strictly
followed.

¹ *Craig v. Brown*, Pet. C. C. 352; *Morgan v. Curtenius*, 4 McLean, 366; *Ripple v. Ripple*, 1 Rawle, 386; *Case v. McGee*, 8 Md. 9; *Settle v. Alison*, 8 Ga. 201; *Balfour v. Chew*, 5 Mart. N. S. 517; *Johnson v. Rannels*, 6 Mart. N. S. 621; *Scott v. Blanchard*, 8 Mart. N. S. 303; *Melvin v. Lyons*, 18 Miss. 78; *Barbour v. Watts*, 2 A. K. Marsh. 290; *Hunt v. Lyle*, 8 Yerg. 142; *Patrick v. Gibbs*, 17 Tex. 275.

² *Warren v. Wade*, 7 Jones (N. C.), 494; *Russel v. Kearney*, 27 Ga. 96; *Carlisle v. Tuttle*, 30 Ala. 613.
³ *Steere v. Tenney*, 50 N. H. 461; *Pennywit v. Kellogg*, 1 Cincin. 17.
⁴ *Caulfield v. Bullock*, 18 B. Mon. 494.
⁵ *Morris v. Patchin*, 21 N. Y. 391; *Lothrop v. Blake*, 3 Penn. St. (3 Barr) 495; *Schnertzell v. Young*, 3 H. & McH. 502; *Sampson v. Overton*, 4 Bibb, 409; *Donohoo v. Brannon*, 10 Overt. 328. See, however, *Stedman v. Patchin*, 34 Barb. 218; *Ault v. Zehering*, 38 Ind. 429.

⁶ *Catlin v. Underhill*, 4 McLean, 199; *Ohio v. Hinchman*, 27 Penn. St. (3 Casey) 484; *Roop v. Clark*, 4 Greene (Iowa), 294; *Sally v. Gunter*, 13 Rich. 72; *Cox v. Jones*, 52 Ga. 438; *Pagett v. Curtis*, 15 La. An. 451; *Low v. Burrows*, 12 Cal. 181.

⁷ *Weeks v. Downing*, 30 Mich. 4.

⁸ *Craig v. Brown*, Pet. C. C. 353; *Cox v. Jones*, 52 Ga. 438; *Strode v. Churchill*, 2 Litt. (Ky.) 75.

⁹ *Turner v. Waddington*, 3 Wash. C. C. 126. See, however, *Simons v. Cook*, 29 Iowa, 324.

¹⁰ *Catlin v. Underhill*, 4 McLean,

a judge presiding at a particular trial, or simply "senior," to others;¹ nor from a judge who styles himself merely "judge of the probate court."² But it has been held sufficient where a judge in his certificate states that he is one of the judges of the court; that all the judges have equal authority, and that each is authorized to sign a certificate of a record.³ Nor is it necessary that the judge should be styled "chief judge," when by the laws of his state he is sole judge of his court.⁴

§ 101. The certificate of the presiding judge must state that the clerk is the then clerk of court, and that his attestation is in "due form," which form is that prescribed by the law of the state from whence the record comes.⁵ The certificate of the presiding judge is conclusive as to the "due form."⁶ The use of the words "proper form," however, instead of "due form," has been held not to be fatal.⁷

§ 102. When a court has ceased to exist, and its records have been transferred to another court, then the presiding judge and clerk of the latter court must certify.⁸

§ 103. If the certificate is in this respect complete, a record will not be rejected, because of omissions or excesses in matters

199; *Stewart v. Gray*, Hemp. 94; *Van Storch v. Griffin*, 71 Penn. St. 240; *Pratt v. King*, 1 Oregon, 49; *Settle v. Allison*, 8 Ga. 201; *Hudson v. Daily*, 13 Ala. 722; *Brown v. Johnson*, 42 Ala. 208. See *Norwood v. Cobb*, 20 Tex. 588.

¹ *Lothrop v. Blake*, 3 Barr, 495; *Stephenson v. Bannister*, 3 Bibb, 369; *Kirkland v. Smith*, 2 Mart. La. (N. S.) 497. See, however, *Taylor v. Kilgore*, 33 Ala. 214.

² *Washabaugh v. Entriken*, 34 Penn. St. 74.

³ *Orman v. Neville*, 14 La. An. 392. See *Arnold v. Frazier*, 5 Strobb. 33; *McKenny v. Gordon*, 13 Rich. S. C. 40; *Johnson v. Howe*, 2 Stew. (Ala.) 27; *Bates v. McCully*, 27 Miss. 584.

⁴ *State v. Hinchman*, 27 Penn. St.

479; *Central Bank v. Veasey*, 14 Ark. 672.

⁵ *Trigg v. Conway*, Hemp. 538; *Craig v. Brown*, Pet. C. C. 354; *Hutchins v. Gerrish*, 52 N. H. 205; *Johnson v. Howe*, 2 Stew. (Ala.) 27; *Duvall v. Ellis*, 13 Mo. 203; *Wilburn v. Hall*, 16 Mo. 426.

⁶ *Ferguson v. Harwood*, 7 Cr. 408; *Tooker v. Thompson*, 3 McLean, 93; *Taylor v. Carpenter*, 2 Wood. & M. 4; *Thompson v. Manrow*, 1 Cal. 428; *Hutchinson v. Patrick*, 3 Mo. 45; *Grover v. Grover*, 30 Mo. 400; *Schoonmaker v. Lloyd*, 9 Rich. 173.

⁷ *White v. Strother*, 11 Ala. 720.

⁸ *Capen v. Emery*, 5 Mete. (Mass.) 436; *Manning v. Hogan*, 26 Mo. 570; *Young v. Thayer*, 1 Greene (Iowa), 196; *Darrah v. Watson*, 36 Iowa, 116.

irrelevant.¹ A copy of a lost record may be certified under the act of Congress.²

§ 104. An office copy of a record, is a copy made by an officer duly authorized for the purpose either by rule of court or by statute. Such copy, when the officer is authorized only by rule of court, is admissible as evidence in the *same court* and in the *same cause*; but, at common law, the copy must be proved to be correct, if it be produced, either in another court, or even in the same court in another cause.³ Even where an action was brought in the queen's bench against a sheriff for a false return to a writ of *feri facias*, the court refused to permit the plaintiff to put in office copies of the writ and of the return, though the original cause was in the same court.⁴ Where, however, an officer is bound, either at common law or by statute, to furnish copies, these copies will "generally be admitted in all courts alike."⁵ In England, by the acts of 12 & 13 Vict. c. 109, records and documents belonging to the common law side of chancery can be thus proved, and this convenience has been subsequently extended to other records.⁶

Office copy
admitted
when au-
thorized
by law.

§ 105. In the United States the distinction between "office copies" and "exemplifications," as existing in England, is not recognized in practice; the reason being that there are but few cases in which there is not some officer appointed by law to give certified copies which shall be generally admissible. The federal statute of 1790 prescribes, as we have seen, a specific form of verification on which judgments in one state shall be received in evidence in another; and even in those cases to which this act does not apply, it has been

Practice in-
dependent
of federal
statute.

¹ Knapp v. Abell, 10 Allen, 485; Gavit v. Snowhill, 26 N. J. L. 76; Clark v. Depew, 25 Penn. St. 509; McCormick v. Deaver, 22 Md. 187; Ducommun v. Hysinger, 14 Ill. 249; Young v. Chandler, 13 B. Mon. 252; Shown v. Barr, 11 Ired. (L.) 296; West Felic. R. R. v. Thornton, 12 La. An. 736.

² Robinson v. Simons, 7 Phila. R. 127.

³ Den v. Fulford, 2 Burr. 1179; Jack v. Kiernan, 2 Jebb & Sy. 231; Barron v. Daniel, Cr. & D. Abr. C. 283.

⁴ Pitcher v. King, 1 C. & Kir. 655.

⁵ Taylor's Ex. § 1384; citing Black v. Ld. Braybrooke, 2 Stark. R. 12-14; Appleton v. Lord Braybrooke, 6 M. & Sel. 37.

⁶ Taylor's Ex. § 1385 *et seq.*

regarded as giving tests a compliance with which secures admissibility.¹ But the act, as we have also seen,² does not provide that no record shall be admitted except on the proof specified; and not only have the courts of several states held that records could be proved at common law by processes less stringent, but in almost every state, statutes have been passed facilitating such proof.³ These statutes place foreign records in a measure on the same footing as domestic, and as therefore more or less subject to rules we will proceed now to notice.

§ 106. A court of record takes judicial notice of its own records; and when on a pending trial the records of such court are relevant, they may be admitted without further proof than is given by their production by the clerk from the proper archives.⁴ It has been even held, that the original papers in an inferior court may be received in evidence in a superior court.⁵ But the genuineness of the paper must be proved as a prerequisite to its reception.⁶

§ 107. So far as concerns the courts of the same state, it is generally held that a copy, certified to be correct by the clerk or proper officer of the court where the record is deposited, will be received in evidence *as primâ facie* proof of the record; nor is it necessary that the certificate of the judge should be appended.⁷ The same decision has

Original records of court in which suit is pending are evidence in such court.

Office copies admissible in same state.

¹ See *supra*, § 97.

² *Supra*, § 98.

³ See *Kingman v. Cowles*, 103 Mass. 283; *Lansing v. Russell*, 3 Barb. 325.

⁴ *Odiorne v. Bacon*, 6 Cush. 185; *Betts v. New Hartford*, 25 Conn. 180; *Burk v. Tregg*, 2 Wash. (Va.) 215; *Sutcliffe v. State*, 18 Ohio, 469; *Prescott v. Fisher*, 22 Ill. 390; *Harrison v. Kramer*, 3 Iowa, 543; *Ward v. Saunders*, 6 Ired. L. 382; *Peck v. Land*, 2 Ga. 1; *Adams v. State*, 11 Ark. 466; *Wallis v. Beauchamp*, 15 Tex. 203; *Larco v. Casaneuava*, 30 Cal. 560; *Sharp v. Lumley*, 34 Cal. 611.

⁵ *State v. Bartlett*, 47 Me. 396;

Odiorne v. Bacon, 6 Cush. 185; *Hart v. Stone*, 30 Conn. 94; *Sherrerd v. Frazer*, 6 Minn. 572; *Williams v. Brummel*, 4 Ark. 129; *Herndon v. Casiano*, 7 Tex. 322.

⁶ *Perry v. May*, 1 Hill S. C. 76.

⁷ *State v. Bartlett*, 47 Me. 396; *Jay v. East Livermore*, 56 Me. 107; *Ladd v. Blunt*, 4 Mass. 402; *Com. v. Phillips*, 11 Pick. 28; *Odiorne v. Bacon*, 6 Cush. 185; *Hart v. Stone*, 30 Conn. 94; *Osborn v. State*, 7 Ohio (Part I.), 212; *Steel v. Pope*, 6 Blackf. 176; *Jenkins v. Parkhill*, 25 Ind. 473; *Anonymous*, 1 Brev. (S. C.) 173; *McCollum v. Herbert*, 13 Ala. 282; *Winters v. Laird*, 27 Tex. 616.

been reached where the copy and the certificate is by the judge and not the clerk of the court.¹ But the certificate to the verity of the transcript must be explicit.² When the whole record is put in evidence, this carries with it all the entries and indorsements on the writs or other papers of which the record is composed.³

§ 108. Nor is this indulgence restricted to copies of judicial records. Public records in general, when under the charge of duly qualified public officers, acting within the range of their duties, are *primâ facie* correct, and may in many cases be brought into court, when within the jurisdiction, by a *subpoena duces tecum*. But in some cases the privilege of the custodian may prevent this; in others, the removal of the originals from their proper archives may be productive of great public inconvenience. In such cases there is a growing tendency, even at common law, to permit the records to be represented by exemplifications or by other authenticated copies.⁴ The document, however, must be of a character technically public.⁵ Thus it has been held by the court of claims that a receipt for property captured, procured from a military governor by a claimant, is not such a public document that an exemplification of it can be put in evidence; but that the original must be produced.⁶

This rule extended to copies of records generally.

¹ Brackett v. Hoitt, 20 N. H. 257.

² Lyon v. Bolling, 14 Ala. 753.

³ Lothrop v. Blake, 3 Penn. St. 483.

⁴ See cases cited *infra*, § 114; and see U. S. v. Gaussen, 19 Wall. 198; Whiton v. Ins. Co. 109 Mass. 24; Thompson v. R. R. 22 N. J. Eq. 111; Dunham v. Chicago, 55 Ill. 359; Bellows v. Todd, 31 Iowa, 18; Allen v. Hoxey, 37 Tex. 320. See *supra*, § 82; *infra*, §§ 114, 127.

⁵ See *infra*, § 127.

⁶ Block v. U. S. 7 Ct. of Claims, 406. As to exemplification of bankruptcy records, see Michener v. Payson, U. S. Cir. Court, 2 Weekly Notes of Cases, 339. In Alexander v. McCullough, 1 Weekly Notes of Cases, the plaintiff, in an action of

ejectment, gave in evidence a certified copy of a petition in bankruptcy, a certificate of the bankrupt's discharge, and a deed from the bankrupt's alleged assignee. It was held by the supreme court of Pennsylvania (affirming the judgment of the court below), that there was no evidence of the appointment of the assignee, and without this the plaintiff could not recover.

On the general question of the admissibility of records, Mr. Taylor (§ 1379) thus speaks:—

“One or other of these copies will always be admissible in lieu of the original record, excepting in two cases: first, if issue has been joined on a plea or replication of *nul tiel record*, in some cause in a court to which the

§ 109. The seal of a court of record is an essential to the attestation of the court of the accuracy of copies from its records.¹ The seal proves itself.² In Massachusetts, however, the usage, sanctioned by the courts, has been for the clerk of the court to attest a copy without attaching the seal of the court.³ And in England, an ancient exemplification has been received without a seal.⁴

§ 110. By Lord Brougham's Evidence Act of 1851, foreign judicial records may be proved by examined copies, sealed with the seal of the proper court, or, if there be no seal, signed and certified to by the judge, who must also certify to the fact of there being no seal.⁵ In this country we have several local statutes to the same effect

At common law, it has been held sufficient if an exemplification disputed record belongs; 2 Ph. Ev. 129; and secondly, if a person is indicted for perjury in any affidavit, deposition, or answer, or for forgery with respect to any record. B. N. B. 239; R. v. Morris, 2 Burr. 1189; R. v. Benson, 2 Camp. 508; R. v. Spencer, Ry. & M. 97; Crook v. Dowling, 3 Doug. 77; Stratford v. Greene, 2 Ball & B. 296; Garvin v. Carroll, 10 Ir. Law R. 330; per Crompton, J.; Lady Dartmouth v. Roberts, 16 East, 340, per Lord Ellenborough and Le Blanc, J. In this last case the judges intimated an opinion that the same strictness was necessary in actions for malicious prosecution; but this would seem to be a mistake. See B. N. P. 13; Purcell v. McNamara, 1 Camp. 200. In either of these cases the original document, unless it be shown that the prisoner has got possession of it, or that it has been lost or destroyed, must be actually produced. R. v. Milnes, 2 Fost. & Fin. 10, per Hill, J. On a trial, too, for perjury, the signatures of the defendant, and of the person whose name is attached to the jurat, must be proved (see note supra); after which the court will presume that the oath was duly administered.

R. v. Spencer, 1 C. & P. 260, per Abbott, C. J.; R. v. Turner, 2 C. & Kir. 732, per Erle, C. J. For the purpose of insuring the production of the original record, application should be made to the court to which it belongs, or to a judge in vacation, who will make the necessary order. Crook v. Dowling, 3 Doug. 77, per Lord Mansfield; Bastard v. Smith, 10 A. & E. 214; Bentall v. Sydney, Ib. 164. The application to the court of chancery, for leave to take an answer off the file, in order to prosecute the defendant for perjury, will be granted as a matter of right. Stratford v. Greene, 1 Ball & B. 294; Keenan v. Boylan, 1 Sch. & Lef. 232."

¹ Turner v. Waddington, 3 Wash. C. C. 126; Hinton v. Brown, 1 Blackf. 429; Thomasson v. Driskell, 13 Ga. 253; Thames v. Erskine, 7 Mo. 213.

² Infra, §§ 318-321, 695; Smith v. Redden, 5 Harring. 321. See Godbold v. Bank, 4 Ala. 516; McLein v. Smith, 17 Mo. 49.

³ Chamberlin v. Ball, 15 Gray, 352.

⁴ Beverley v. Craven, 2 M. & Rob. 140.

⁵ Taylor's Evidence, § 1398.

of a foreign record is certified to by the clerk and the presiding judge, with a certificate under the great seal of the state of the official character of the judge.¹ It has also been ruled that sworn copies, proved by the copyist himself, will be received, when attested by the seal of the clerk.² A certificate from a secretary of foreign affairs has been held sufficient to authenticate the proceedings of a foreign court.³ But a consular certificate is not sufficient to authenticate the copy of a record of a foreign court of admiralty. The seal must be proved by a witness to whom it is familiar.⁴ It has been held that an exemplification may be admitted on proof by an expert of the genuineness of the seal of the court and of the signature of the judge;⁵ and, when the court has no seal, by proof of the handwriting of the clerk, and of the regularity of the exemplification.⁶ It has even been held that the exemplification of the record of a foreign court, admitted to have common law jurisdiction, may be proved by the signature of the clerk verified by the seal of the court.⁷

§ 111. Ordinarily, when a statute authorizes the recording of deeds or other instruments, the book in which the registry is made is by the statute made admissible as evidence.⁸ Where it is not made so admissible, then, in order to enable such book to be put in evidence, the usual foundation accounting for the non-production of the original must be laid.⁹ Whether the book of the registry of a deed is primary evidence depends, as has been just stated, upon the terms of the

Registry of
deed ad-
missible.

¹ *Watson v. Walker*, 23 N. H. 471; *Hubbart*, 2 Cranch, 187. See *infra*, *Spaulding v. Vincent*, 24 Vt. 501; § 119.

Griswold v. Piteairn, 2 Conn. 85; ⁴ *Catlett v. Ins. Co.* 1 Paine, 594.

Thompson v. Stewart, 3 Conn. 171; ⁵ *Owings v. Nicholson*, 4 Har. & J.

Hadfield v. Jamieson, 2 Munf. 53; 66.

Stewart v. Swanzy, 23 Miss. 502.

⁶ *Packard v. Hill*, 7 Cow. 434.

² *Pickard v. Bailey*, 26 N. H. 152; ⁷ *Lazier v. Westcott*, 26 N. Y. 146;

Buttrick v. Allen, 8 Mass. 273; *Spaulding v. Vincent*, 24 Vt. 501; *Delafield* though see *Vandervoort v. Smith*, 2

v. Hand, 3 Johns. R. 310; *Stewart v. Caines*, 154.

Swanzy, 23 Miss. 502. ⁸ *Dick v. Balch*, 8 Pet. 30; *Thomas*

v. Magruder, 4 Cranch C. C. 446.

⁹ *Stanglein v. State*, 17 Oh. St. 453; ⁹ *Den v. Gustin*, 12 N. J. L. 42;

U. S. v. Wiggins, 14 Pet. 334; *U. S. v. Rucker v. McNeely*, 5 Blackf. 123;

Rodman, 15 Pet. 130; *Stein v. Bowman*, 13 Pet. 209. But see *Church v. Peck v. Clark*, 18 Tex. 239. See

Reinboth v. Zerbe, 29 Penn. St. 139.

statute.¹ Where the book is not made evidence by statute, then it can only be received without due explanation of the non-production of the original.² In any view the registry is only *primâ facie* proof of the authenticity of the original.³

§ 112. In England the memorial of a registered conveyance is inadmissible as primary evidence against third persons to prove the contents of the deed ;⁴ although against the party by whom the deed is registered, and those who claim under him, it can certainly be received as secondary,⁵ if not as primary,⁶ evidence, being considered in the light of an admission.⁷ So an examined copy of the registry has been received as secondary evidence of the contents of an indenture, not only as against parties to the deed, who have had no part in registering it, but also as against third persons ; but, in all these cases, the evidence has been admitted under special circumstances : as, for instance, where parties have been acting for a long period in obedience to the provisions of the supposed instrument, or where the deed has been recited or referred to in other documents admissible in the cause.⁸ In any view the enrolment of a lease granted by the crown is primary evidence, because the possessions of the crown cannot be alienated but by matter of record.⁹

§ 113. It is elsewhere noticed that an ancient deed, when 'accompanied with thirty years' possession, is admissible without proof of execution.¹⁰ The same indulgence is extended to ancient registries, so as to cure irregularity of authentication,¹¹ and to ancient maps, establishing boundaries.¹²

§ 114. It has been already observed that entries in a public

¹ See also *Van Cortlandt v. Tozer*, 17 Wend. 338 ; *S. C.* 20 Wend. 423.

² *Den v. Gustin*, 12 N. J. L. 42 ; *Peck v. Clark*, 18 Tex. 239. See *infra*, § 130 *et seq.*

³ *Morris v. Keyes*, 1 Hill (N. Y.), 540.

⁴ *Molton v. Harris*, 2 Esp. 549 ; *Taylor's Ev.* § 389, from which this section is derived.

⁵ *Doe v. Clifford*, 2 C. & Kir. 448.

⁶ *Boulter v. Peplow*, 9 C. B. 502.

⁷ *Wollaston v. Hakewill*, 3 M. & Gr. 297.

⁸ See *Sadler v. Biggs*, 4 H. of L. Cas. 435 ; *Peyton v. McDermott*, 1 Dru. & W. 198 ; *Collins v. Maule*, 8 C. & P. 502.

⁹ *Rowe v. Brenton*, 8 B. & C. 755.

¹⁰ See *infra*, § 703.

¹¹ *Rust v. Boston Mill Co.* 6 Pick. 158 ; *King v. Little*, 1 Cush. 436 ; *Adams v. Stanyan*, 24 N. H. 405.

¹² *Adams v. Stanyan*, 24 N. H. 405. See *infra*, §§ 194, 703.

register can be proved by putting in evidence the register itself, after first proving from whence it came. Such a mode of proof, however, is productive of so much collateral inconvenience, in withdrawing from the public use, from time to time, books of such high importance, exposing them to injury and dilapidation, that, independently of the statutes which have been enacted for this purpose, it has been frequently held admissible to prove their contents by exemplifications or certified copies.¹ The originals, however, must be in some sense records. Thus it has been held by the court of claims that copies, certified by the secretary of the treasury, of portions of the "archives of the late so-called Confederate government," are inadmissible, but that the originals should be produced.²

Certified
copy of
official reg-
ister re-
ceivable.

¹ *Supra*, § 108; *infra*, § 127. See Lord Abinger in *Mortimer v. McCallan*, 6 M. & W. 67; *Taylor's Ev.* § 1436; and see, also, *Lynch v. Clerke*, 3 Salk. 154; 2 Doug. 593; *R. v. Hains*, Comb. 337; *Hoe v. Nathrop*, 1 Ld. Ray. 154.

In England this is effected by Lord Brougham's Evidence Act of 1851; *Taylor's Ev.* § 1437 *et seq.* But as common law authorities to the same effect, see cases above cited, and also *Bingham v. Cabbot*, 3 Dal. 19; *U. S. v. Johns*, 4 Dal. 412; *U. S. v. Acosta*, 17 Pet. 16; 1 How. 24; *U. S. v. Corwin*, 1 Bond, 149; *U. S. v. Gaussen*, 19 Wall. 198; *Hodgdon v. Wight*, 36 Me. 326; *Eastport v. East Machias*, 35 Me. 402; *Jay v. Carthage*, 48 Me. 353; *Willey v. Portsmouth*, 35 N. H. 303; *Abington v. Bridgewater*, 23 Pick. 170; *Whiton v. Ins. Co.* 109 Mass. 24; *Gray v. Davis*, 27 Conn. 447; *Thompson v. R. R.* 22 N. J. Eq. 111; *Hyam v. Edwards*, 1 Dall. 2; *Rhodes v. Seibert*, 2 Penn. St. 18; *Vail v. McKernan*, 21 Ind. 421; *Lane v. Bommelmann*, 17 Ill. 95; *Leo v. Getty*, 26 Ill. 76; *Dunham v. Chicago*, 55 Ill. 357; *Bellows v. Todd*, 31 Iowa, 18; *Fain v. Garthright*, 5 Ga. 6; *Brakebill v. Leonard*, 40 Ga. 60; *Hall v. Acklen*,

9 La. An. 219; *Davis v. Freeland*, 32 Miss. 645; *St. Louis Ins. Co. v. Cohen*, 9 Mo. 421; *Barton v. Murrain*, 27 Mo. 235; *Hurlbutt v. Butenop*, 27 Cal. 59. See, however, *Chouteau v. Chevalier*, 1 Mo. 343.

² *Schaben v. U. S.* 6 Ct. of Cl. 230. See *Steere v. Tenney*, 50 N. H. 461; *Pennywit v. Kellogg*, 1 Cincin. 17.

The method of exemplifying public records under the federal statutes is thus accurately stated:—

"The mode of authenticating documents of the departments of the United States is governed by the laws of the United States and the practice of such departments, and not by the statutes of the states. *Gilman v. Riopelle*, 18 Mich. 115. By the Act of Congress of the 15th of September, 1789, all copies of records and papers in the office of the secretary of state, authenticated under the seal of his office, are made competent evidence equally with the original record or paper. *Brightly's Dig.* 846, § 7. By a subsequent act, passed 22d of February, 1849, all books, papers, documents, and records in the war, navy, treasury, and post-office departments, and the attorney general's office, may be copied and certified, un-

§ 115. In addition, however, to the common law rule, which has been just noticed, the statutes authorizing the recording of deeds and other instruments prescribe, almost universally, that exemplifications of the instruments so recorded shall be admissible in evidence as *prima facie* proof of their contents. To make such copies evidence, however, the requisites of the statute prescribed for the recording and for exemplifications must be complied with.¹ The mere recording

Exemplifications of recorded deeds admissible.

der seal, in the same manner as those in the State Department, and with the same force and effect. *Brightly's Dig.* 269, § 17.

"It is the certificate of the officer who is the custodian of the original paper, document, or record, and the seal of the department, which makes the transcript evidence. *Smith v. The United States*, 5 Peters, 292, 300. The certificates, in this case, are in compliance with the several modes of authenticating documents under the act of Congress; *Catlett v. Pacific Ins. Co.* 1 Paine C. C. 594, 612; 1 Wend. 561, 578; 4 Wend. 75; *Smith v. The United States*, 5 Pet. 292, 297; and the transcript was properly received in evidence.

"But independently of this transcript, the oral proof in the cause and the certificate of the provost marshal issued to the volunteer on his enlistment, fully establish the facts that the plaintiff was enlisted and mustered into the service, and accepted by the mustering officer as a volunteer, and credited upon the quota of the city. Testimony of this character is competent, and may be received in substitution of transcripts from the muster-rolls of the war department, or even to contradict the entries of enlistments in the books of that department. *Chapman Township v. Herrold*, 58 Penn. St. R. 106; *Town of Lebanon v. Heath*, 47 N. Hamp. 353; *Steinberg v. Eden*, 41 Vt. 187." De-

pue. *J., Hawthorne v. City of Hoboken*, 35 N. J. 251.

We must remember that we have to go elsewhere than to English practice for authorities in reference to the admissibility of copies of registered deeds. The policy of the English landed interests was, until recently, to keep titles secluded from public inspection; and, as we will elsewhere see, so jealously was this view maintained, that a party could not be compelled to disclose his title unless upon the presentation of a substantial ease against him. With us the tendency is in the other extreme, leading us to rely rather on the registry than the deed for title, and consequently to be more careless about the formalities of conveyancing.

In England, however, under the new practice, besides the mode of proving enrolments which has just been stated, it is clear that they may now be proved in most, if not in all, cases by the production of *office copies*; and by several acts of parliament such copies are made evidence, not only of the enrolment itself, but of the *contents of the instruments enrolled*.

¹ *Smith v. U. S.* 5 Pet. 292; *Bruce v. U. S.* 17 How. 437; *Younge v. Guilbeau*, 3 Wall. 636; *Webster v. Calden*, 55 Me. 171; *Farrar v. Fessenden*, 39 N. H. 268; *Crowell v. Hopkinton*, 45 N. H. 9; *Williams v. Bass*, 22 Vt. 352; *Pratt v. Battles*, 34 Vt. 391; *Abington v. North Bridgewater*, 23

of an instrument, however, does not make a copy of it evidence unless the instrument is one of the class covered by the statute.¹ Nor, as will be in a moment seen, can the grantee in a deed, who holds it and sues on it, hold it back and produce merely an exemplification of its registry. In all cases, however, when the object is to prove a link of title or to use a deed evidentially, an exemplification of the record is enough.² So, also, a party in

Pick. 170; *Cone v. Emery*, 2 Gray, 80; *Pierce v. Gray*, 7 Gray, 67; *Bolton v. Cummings*, 25 Conn. 410; *Has-sell v. Borden*, 1 Hilt. (N. Y.) 128; *Garrigues v. Harris*, 17 Penn. St. 344; *Curry v. Raymond*, 28 Penn. St. 144; *Oliphant v. Ferren*, 1 Watts, 57; *Snyder v. Bowman*, 4 Watts, 133; *Harper v. Bank*, 7 Watts & S. 204; *Connelly v. Bowie*, 6 Har. & J. 141; *McCauley v. State*, 21 Md. 556; *Pollard v. Lively*, 4 Grat. 73; *Bohanan v. Shelton*, 1 Jones L. 370; *Hughes v. Debnam*, 8 Jones L. 127; *Clarke v. Diggs*, 6 Ired. L. 159; *Maxwell v. Carlile*, 1 McCord, 534; *Williams v. Cowart*, 27 Ga. 187; *Massey v. Hackett*, 12 La. An. 54; *Graham v. Williams*, 21 La. An. 594; *Carpenter v. Featherston*, 15 La. An. 235; *Cogan v. Frisby*, 36 Miss. 178; *Davis v. Rhodes*, 39 Miss. 152; *Bryan v. Wear*, 4 Mo. 106; *Gentry v. Garth*, 10 Mo. 226; *Gates v. State*, 13 Mo. 11; *Charlotte v. Chouteau*, 21 Mo. 590; *Musick v. Barney*, 49 Mo. 458; *Sheldon v. Coates*, 10 Ohio, 278; *Dennis v. Hopper*, 18 Ill. 82; *Deining v. McConnel*, 41 Ill. 229; *Moorehouse v. Potter*, 15 Ind. 477; *Wells v. State*, 22 Ind. 241; *Niles v. Sprague*, 13 Iowa, 198; *Middleton Bank v. Dubuque*, 19 Iowa, 469; *Fouke v. Ray*, 1 Wise. 104; *Brown v. Cady*, 11 Mich. 535; *Gilman v. Riopelle*, 18 Mich. 145; *Smith v. Brannan*, 13 Cal. 107; *Dixon v. Thatcher*, 14 Ark. 141; *Touchard v. Keyes*, 21 Cal. 202; *Garwood v. Hastings*, 38 Cal. 216; *Canfield v. Thompson*, 49 Cal. 211; *Crayton v. Munger*,

11 Tex. 234; *Dikes v. Miller*, 25 Tex. 281, Suppt. As to exemplifications of patents, see *Peck v. Farrington*, 9 Wend. 44; *Davis v. Gray*, 17 Oh. St. 330. In Wisconsin, where § 71, ch. 137, R. S., provides that where a certified copy of any record, document, &c., is allowed by law to be evidence, "such copy shall be certified by the officer in whose custody the same is required by law to be to have been compared by him with the original, and to be a correct transcript therefrom," &c., it is ruled, that this statute requires the officer to certify separately to each document offered in evidence. *Newell v. Smith*, 38 Wise. 39.

¹ *Lemon v. Bacon*, 4 Cranch C. C. 466; *New York Dry Dock v. Hicks*, 5 McLean, 111; *Hammatt v. Emerson*, 27 Me. 308; *Wendell v. Abbott*, 43 N. H. 68; *Coule v. Harrington*, 7 Har. & J. 147; *Miles v. Knott*, 12 Gill & J. 442; *Berry v. Matthews*, 13 Md. 537; *Rushin v. Shields*, 11 Ga. 636; *Thomas v. Bank*, 17 Miss. 204; *Haile v. Palmer*, 5 Mo. 403; *Childress v. Cutter*, 16 Mo. 24; *Reading v. Mullen*, 31 Cal. 104; *Fitzpatrick v. Pope*, 39 Tex. 314; *Mapes v. Leal*, 27 Tex. 315. For cases of the reception of the informal registry of an ancient grant, see *Archibald v. Davis*, 1 Jones L. 133; *McMullen v. Brown*, Harper, 76.

² Independently of rules of court, the certified copy of a deed duly recorded is *prima facie* evidence, when the party producing it is not the grantee. *Scanlan v. Wright*, 13 Pick.

whose power the instrument is, or can be, cannot hold it back and offer instead an exemplification of the record. The non-production of the original must be accounted for.¹

§ 115. When the deed is duly acknowledged and certified, the copy may be read in evidence if otherwise admissible, irrespective of the mode of attestation, in all cases where the statute does not prescribe a particular mode of attestation.² In such case there is no necessity of calling the subscribing witnesses.³

523; *Hood v. Fuller*, 15 Pick. 185; *Commonwealth v. Emery*, 2 Gray, 81; *Hatch v. Bates*, 54 Maine, 138. See, also, *Groff v. Ramsey*, 19 Minn. 44; *Bourne v. Boston*, 2 Gray, 497.

"The defendant objects that a record copy of a deed in the line of his title was offered by the plaintiffs and admitted in evidence, without any previous notice to him to produce the original, or any attempt to obtain it by other means. This ruling was clearly right. The rule requiring the production of an original deed applies only to a case where it is necessary to prove a conveyance directly to a party to a suit, and which may reasonably be supposed to be in his possession, but does not include prior deeds in a chain of title. *Commonwealth v. Emery*, 2 Gray, 80." *Bigelow, C. J., Thacher v. Phinney*, 7 Allen, 148. See, to same general effect, *Ury v. Houston*, 36 Tex. 260.

¹ *McEwen v. Bulkley*, 24 How. 242; *White v. Dwinel*, 33 Me. 320; *Farrar v. Fessenden*, 39 N. H. 268; *Com. v. Emery*, 2 Gray, 80; *Den v. Gustin*, 12 N. J. L. 42; *Bissell v. Pearce*, 28 N. Y. 252; *Pardee v. Lindley*, 31 Ill. 174; *Candler v. Lunsford*, 4 Dev. & B. L. 18; *Peek v. Clark*, 18 Tex. 239; *Ury v. Houston*, 36 Tex. 260.

² "It is also objected that the registered copy, when produced, disclosed the fact that the deed was not executed in the presence of any subscribing witness. But it was not necessary

to its validity that it should have been so signed. *Dole v. Thurlow*, 12 Met. 157, 165. Nor did the fact that the grantor executed it without calling a witness to attest the signature in any way affect the competency of the copy which was admitted in evidence. An acknowledgment of a deed duly certified is essential to authorize the register of deeds to put it on record; Gen. Sts. c. 89, § 28; but there is no provision which renders any particular mode of execution necessary, in order to render a deed legally suitable for registry. As the deed in question was duly recorded, the record copy was good *primâ facie* evidence of the contents of the original deed." *Bigelow, C. J., Thacher v. Phinney*, 7 Allen, 148.

³ *Infra*, § 740. "The office copy of the deed, Wm. M. Mann to Obadiah Mann, dated July 28, 1853, was properly received under the provision of the statute of 1862, c. 112. This was held *primâ facie* to establish the tenant's title. *Blethen v. Dwinel*, 34 Maine, 133. An office copy being *primâ facie* evidence, there is no necessity for calling the attesting witness. *Eaton v. Campbell*, 7 Pick. 12. It raises a presumption that the grantor had sufficient seisin to enable him to convey, and operates to vest the legal seisin in the grantee. *Ward v. Fuller*, 15 Pick. 185. When the original is not in the custody of, or power of the party having occasion to use it, the

§ 116. The copy may be certified to by the officer designated by the statute or by his deputy acting for him and in his name.¹ If by a stranger, the certificate is void.² There need, however, be no *fac-simile* of vignette or seal, if the seal be indicated.³

§ 117. An abstract or summary of an instrument is not within the recording statutes, and is not made evidence by force of such statutes.⁴ Nor can an exemplification be admissible in cases where the original would not be received.⁵

§ 118. An exemplification from a registry of another state is not admissible merely by force of the statutes of such other state.⁶ It must be authenticated (unless there be local legislation or adjudications prescribing less stringent tests) according to the act of Congress.⁷ When the act of Congress is substantially complied with, they may be received.⁸ But it must appear that the registry was in conformity with the laws of the

Exemplifications of deeds recorded in other states must be proved under act of Congress.

certified copy is *primâ facie* evidence of the original and its execution, subject to be controlled by rebutting evidence. Com. v. Emery, 2 Gray, 80." Appleton, C. J., Webster v. Calden, 55 Maine, 171.

¹ U. S. v. Griffith, 2 Cranch C. C. 366; Bleecker v. Bond, 3 Wash. C. C. 329; Dyer v. Snow, 47 Me. 254; Hayne v. Porter, 45 Ill. 318; Greasons v. Davis, 9 Iowa, 219; Watson v. Tindal, 21 Ga. 494; Stephens v. Westwood, 25 Ala. 716; Clark v. Hummerle, 36 Mo. 620; Triplett v. Gill, 7 J. J. Marsh. 438.

² Woods v. Banks, 14 N. H. 101; State v. Clark, 24 N. J. L. 516; Devling v. Williamson, 9 Watts, 311.

³ Sneed v. Ward, 5 Dana, 187; Holbrook v. Nichol, 36 Ill. 161; State v. Bailey, 7 Iowa, 390. *Infra*, § 693.

That the copy is only *primâ facie* proof as to authenticity and accuracy, and may be assailed, see Harvey v. Mitchell, 31 N. H. 575; Preston v. Robinson, 24 Vt. 583; Eberts v. Eberts, 55 Penn. St. 110; Sams v. Shield, 11 Rich. 182; Cong. Church v.

Morris, 8 Ala. 182; Harvey v. Thorpe, 28 Ala. 250.

⁴ Olven v. Boyle, 15 Me. 147; Maguire v. Sayward, 22 Me. 230; Griffith v. Tunckhouser, Pet. C. C. 418; Struthers v. Reese, 4 Penn. St. 129; Cox v. Cox, 26 Penn. St. 375; Drake v. Morris, 2 Jones L. 368; Wray v. Ho-ya-pa-nubby, 18 Miss. 452; Foute v. McDonald, 27 Miss. 610. See *supra*, § 80.

⁵ State v. Wells, 11 Oh. 261.

⁶ Drummond v. Magruder, 9 Cranch, 122; Hylton v. Brown, 1 Wash. C. C. 298; Quay v. Ins. Co. Anthon, 173; Petermans v. Laws, 6 Leigh, 523. See Thompson v. Bank, 3 Coldw. 46.

⁷ Drummond v. Magruder, 9 Cranch, 122; Seerist v. Green, 3 Wall. 744; Garrigues v. Harris, 17 Penn. St. 344; Pennel v. Wayant, 2 Harring. 502; Key v. Vaughn, 15 Ala. 497; Watrous v. McGrew, 16 Tex. 506. See McCormick v. Evans, 33 Ill. 327.

⁸ King v. Dale, 1 Seam. 513; Spencer v. Langdon, 21 Ill. 192; Rochester v. Toler, 4 Bibb, 106; Smith v. Roach, 7 B. Mon. 17.

registering state, which must be duly proved.¹ Even when thus duly proved, a copy of a deed recorded in another state cannot be received to pass the title to lands in a state where it is provided by statute that title shall only be passed by deeds recorded in the county where the land lies.²

§ 119. Exemplifications of foreign wills, decrees, or grants, or of other instruments that cannot be removed from the original archives, may be proved by the official certificate and seal of the secretary of the sovereign of the country where the archives exist.³ In Pennsylvania, an exemplification of a will under the seal of the English prerogative court has been received.⁴ So notarial copies have, in proper cases, been received.⁵

§ 120. At common law, the certificate of a public officer, no matter how high and solemn his office, is inadmissible to prove any disputed fact. The officer, if living, must be produced to swear to the fact. If he be dead, his official entries, made in the discharge of his duties, may be evidence. If the object is to prove that a fact appears by record, the record itself must be exemplified or produced. His certificate, however, being of the nature of hearsay, and *ex parte*, is in itself inadmissible.⁶ When the certificate states a conclu-

¹ *Stevens v. Bomar*, 9 Hump. 546; *Dickson v. Grissom*, 4 La. An. 538; *Dunlop v. Dougherty*, 20 Ill. 397; *Kidd v. Manley*, 28 Miss. 156.

² *State v. Engle*, 21 N. J. L. 347; *Kelley v. Ross*, Busb. (N. C.) L. 184.

³ *U. S. v. Wiggin*, 14 Pet. 334; *U. S. v. Delespine*, 15 Pet. 226; *De Sobry v. De Laistre*, 2 Har. & J. 19. See *supra*, § 110.

⁴ *Weston v. Stammers*, 1 Dall. 2.

⁵ *Bowman v. Sanborn*, 25 N. H. 87.

⁶ *Roberts v. Eddington*, 4 Esp. 88; *Omichund v. Barker*, Willes, 549; *Sewell v. Corp.* 1 C. & P. 392; *R. v. Sewell*, 8 Q. B. 161; *Swan v. Hughes*, 1 Wash. C. C. 216; *Barert v. Day*, 3 Wash. C. C. 243; *Great Pond Co. v. Buzzell*, 39 Me. 173; *Jay v. East Livermore*, 56 Me. 107; *Davis v. Clements*, 2 N. H. 390; *Wells v. Burbank*,

17 N. H. 393; *Oakes v. Hill*, 14 Pick. 442; *Reed v. Scituate*, 7 Allen, 141; *Wayland v. Ware*, 104 Mass. 46; *Wayland v. Ware*, 109 Mass. 248; *Hopkins v. Millard*, 9 R. I. 37; *Jackson v. Miller*, 6 Cow. 751; *Erickson v. Smith*, 38 How. N. Y. (Pr.) 454; *Wilkinson v. Jewett*, 7 Leigh, 115; *Harbers v. Tribby*, 62 Ill. 56; *Copeland, ex parte*, Rice, Ch. 69; *White v. Clements*, 39 Ga. 232; *Chouteau v. Chevalier*, 1 Mo. 343; *Stoner v. Ellis*, 6 Ind. 152; *Greenwood v. Spiller*, 3 Ill. 502; *Cross v. Mill Co.* 17 Ill. 64; *Allen v. Dunham*, 1 Greene (Iowa), 89; *Cardwell v. Mebane*, 68 N. C. 485; *Mayo v. Johnson*, 4 Ark. 613; *Obermier v. Core*, 25 Ark. 562. See, however, as to certificates by foreign dignitaries, *Bingham v. Cabot*, 3 Dall. 19; *U. S. v. Acosta*, 1

sion from a record, the record itself is the primary evidence. Thus a certificate from a clerk, stating the effect of a judicial proceeding (*e. g.* a judgment or decree), is not admissible to prove the fact therein stated when the object is dispositive. The record itself must be set forth.¹ So a certificate from the United States commissioner of patents that diligent search has been made, and that it does not appear that a certain patent has been issued, is not competent evidence of that fact.² Statutes, how-

How. 24; 17 Pet. 16; *U. S. v. Mitchell*, 3 Wash. 95. As to certificates of consuls, *U. S. v. Mitchell*, 2 Wash. C. C. 478; *Morton v. Barrett*, 19 Me. 109; as to protests of masters of ships, *Harper v. Long*, 1 Dal. 6; as to certificate of marine surveyors, *Perkins v. Ins. Co.* 10 Gray, 312; as to certificates of acknowledgment of deeds, see *infra*, § 1052.

The government inspector's certificate is not evidence upon the question whether a steamboat engine is constructed in accordance with the terms of the manufacturer's contract. *Clark v. Detroit*, 32 Mich. 348.

¹ *McGuire v. Sayward*, 22 Me. 233; *Jay v. Livermore*, 56 Me. 109; *Oakes v. Hill*, 14 Pick. 448; *Green v. Durfee*, 6 Cush. 363. *Infra*, § 824.

² *Bullock v. Wallingford*, 55 N. H. 619.

"The certificate should have been rejected. It was the conclusion drawn by the certifying officer from the examination of the records in his office, and possibly he may have been mistaken. *Hanson v. South Scituate*, 115 Mass. 336. The statute authorizes him to certify to the correctness of copies of records in his office. What effect shall be given to such copies is a question for the court when put in evidence. When a party desires to prove the negative fact that there is no record, he must do so in the usual way,—by the deposition of the proper officer, or by producing him in court

so that he may be sworn and cross-examined as to the thoroughness of the search made. If the summoning of such officer to testify in relation to the public records at the call of a suitor shall be found impracticable by reason of interfering with all his public duties, the remedy must be found in further legislation. The court cannot disregard the plain rules of evidence to meet the difficulty." *Smith, J., Bullock v. Wallingford*, 55 N. H. 620.

So it has been ruled in Massachusetts, that while an official certificate to a fact may be by statute admissible, it is otherwise at common law, as to an official summary of a document.

"The certificate of discharge was also competent for the purpose of showing that Thomas did not leave the service otherwise than by reason of an honorable discharge. The defendant did not ask for any ruling as to the effect to be given to the indorsements upon it subsequently made at the office of the adjutant general of the army of the United States; but objected generally to its admissibility apparently for any purpose. What effect was given to these by the presiding judge is not shown by the exceptions; but its admissibility was not affected by indorsements, which, without the consent of the soldier, had subsequently been placed upon it.

"In *Fitchburg v. Lunenburg*, 102 Mass. 358, reported since this case was

ever, have been passed, in many instances, authorizing public officers to certify to facts within the range of their departments; and so convenient is this practice, that the tendency of the courts is to so construe these statutes, when this may be done consistently with their letter, as to make such certificates *prima facie* evidence of the facts to which they certify.¹

tried, it was held that a certificate in due form, from the proper military officer, of an honorable discharge from the military service of the United States, was conclusive evidence of the cause and manner of leaving the service by a soldier, and that evidence, which in that case had been offered of the soldier's previous absence from duty, and of his arrest for desertion, unaccompanied by any evidence that he had been convicted or sentenced therefor, was incompetent and rightly rejected. Under this decision much of the evidence which was admitted for the defendant was immaterial, and it remains only to be seen whether it was in any way prejudiced as to the true issue of the case by the refusal to give the instructions requested, or to receive such other evidence as was offered.

"The defendant requested the court to rule that the rolls admitted were conclusive evidence of desertion. Upon the muster-roll, which is made every two months, the reasons and time of absence of each soldier are required to be entered (Articles of War, art. 13, U. S. St. of 1806, c. 20), and entry of the word 'deserted,' by the commanding officer of the company, who is then to account for all the men of his command, against the name of the soldier, is in the nature of a charge against such soldier of the crime of desertion; but it is not an adjudication that he is guilty of the offence, which, as it is one of the gravest offences known to the military

law, can be made only by a court-martial. The court, therefore, in permitting this evidence of the entry upon the muster-roll to be weighed with the other evidence in the case upon the question of wilful desertion, gave it a consideration at least as great as that to which it was entitled.

"The certificate from the adjutant general's office, signed by one of the assistant adjutants general, of what appeared from the records of that office, did not profess to be a transcript of the records, but was simply a statement of what the certifying officer, under whose hand it was, deemed to be shown by them; and was rightly rejected, even if otherwise competent, for the reason that it was clearly possible that the officer might have been mistaken as to the true conclusions to be drawn from the records. *Oakes v. Hill*, 14 Pick. 442; *Robbins v. Townsend*, 20 Pick. 345." *Devens, J.*, *Hanson v. South Scituate*, 115 Mass. 341.

¹ *R. v. Levy*, 8 Cox C. C. 73; *R. v. Wenham*, 10 Cox C. C. 222; *Williams v. Canal Co.* L. R. 3 Ex. 158; *Oakes v. Turquand*, L. R. 2 H. L. 325; *Laing v. Reed*, L. R. 5 Ch. Ap. 4; *Fellows v. Pedrick*, 4 Wash. C. C. 477; *Levy v. Burley*, 2 Sumn. 355; *Ferguson v. Clifford*, 37 N. H. 86; *Bartlett v. Boyd*, 34 Vt. 256; *Lemington v. Blodgett*, 37 Vt. 210; *People v. Cook*, 14 Barb. 259; *State v. Clothier*, 30 N. J. L. 351; *Weidman v. Kohr*, 4 Serg. & R. 174; *Crane v. State*, 1 Md. 27; *Prather v. Johnson*,

§ 122. But where the duty of a public officer is merely to certify to a record, this will not be construed as giving him authority to certify to facts explanatory of or collateral to the record.¹ The certificate, also, must be made by the officer himself or his legal deputy. If by a person without official character, it is inoperative.² Nor can such certificate cover facts out of the range of the officer's official cognizance;³ nor facts which are but a summary of writings on file in the archives of such officer.⁴ The certificate cannot be by an informal letter or memorandum; it must be formally certified to, under the officer's seal.⁵

3 Har. & J. 487; *Morrill v. Gelston*, 34 Md. 413; *Usher v. Pride*, 15 Grat. 190; *Hellington v. White*, 1 Bibb, 115; *Brooking v. Dearmond*, 27 Ga. 58; *New Orleans R. R. v. Lea*, 12 La. An. 388; *Jones, Succession of*, 12 La. An. 397; *Tucker v. Burris*, 12 La. An. 871; *Gum v. Tanis*, 6 Mo. 330; *Fayette Co. v. Chitwood*, 8 Ind. 504; *De-launay v. Burnett*, 9 Ill. 454; *Johnston v. University*, 35 Ill. 518; *Clark v. Polk Co.* 19 Iowa, 248; *Pierson v. Reed*, 36 Iowa, 257; *Dorman v. Ames*, 12 Minn. 451; *McDonald v. Edmonds*, 44 Cal. 328. See *Grant v. Coal Co.* *Weekly Notes of Cases*, 215. See, as to ruling that inventories by sworn appraisers of decedents' estates are admissible for or against strangers, *Seavey v. Seavey*, 37 N. H. 125.

Thus, under the U. S. St. of 1864, c. 106, § 6, a copy of the certificate of organization of an United States national bank, which was certified by the comptroller of the currency and authenticated by his seal of office, is competent evidence in a state court. *Tapley v. Martin*, 116 Mass. 275. See *Washing. Co. Bk. v. Lee*, 112 Mass. 521; *First Nat. Bk. of Memphis v. Kidd*, 20 Minn. 234.

"The copy of the certificate of organization of the Hide and Leather National Bank, certified by the comptroller of the currency, was properly

admitted in evidence. The act of Congress provides that copies of such certificates, duly certified by the comptroller, and authenticated by his seal of office, shall be 'evidence in all courts and places within the United States.' U. S. St. 1864, c. 106, § 6. And, independently of this provision, such certificates, when filed, are a part of the public records, and may be proved by duly authenticated copies. *Stetson v. Gulliver*, 2 Cush. 494; *Oakes v. Hill*, 14 Pick. 442." *Morton, J., Tapley v. Martin*, 116 Mass. 275-76.

¹ *Brown v. Galloway*, Pet. C. C. 291; *Flanders v. Thompson*, 2 N. H. 421; *Stewart v. Allison*, 6 Serg. & R. 324; *Martin v. Anderson*, 21 Ga. 301; *Littleton v. Christy*, 11 Mo. 390; *Brown v. The Independent, Crabbe*, 54.

² *Bleecker v. Bond*, 3 Wash. C. C. 329; *Runk v. Ten Eyck*, 21 N. J. L. 756; *Urket v. Coryell*, 5 Watts & S. 60.

³ *Garwood v. Dennis*, 4 Binn. 314; *Newman v. Doe*, 4 How. (Miss.) 522.

⁴ *Armstrong v. Boylan*, 1 South. (N. J.) 76. See *supra*, § 80.

⁵ *Davis v. White*, 3 Yeates, 587; *McKenzie v. Crow*, 1 Yeates, 428; *Morgan Co. Bk. v. People*, 21 Ill. 304. See *Brink v. Spaulding*, 41 Vt. 96.

§ 123. In England, as we have already seen, whatever may have been the earlier tendency of the courts, it is now held that the execution of a foreign or colonial deed cannot be proved by a notary's certificate.¹ It is otherwise, however, by the law merchant, in respect to foreign negotiable paper; as to which the original protests, or duly certified copies, when proved by the notarial seal, are *prima facie* evidence of demand and protest.² Such certificates, however, must be in conformity with the local law, on the principle, *locus regit actum*.³ The facts certified to must appear to have been within the cognizance of the notary, and to relate to bills of exchange, or protests of ships,⁴ and the protest must have been promptly made.⁵ Protest must be under seal,⁶ though this may be shown by the inspection of the document, when not recited in the certificate.⁷ The protest, it should be remembered,

Notary's
certificate
admissible.

¹ Nye v. Macdonald, L. R. 3 P. C. 331; Earl's Trusts, L. R. 8 Eq. 98. So, also, Diez, in re, 56 Barb. 591. And see fully, *supra*, § 120.

² 2 Daniel on Negot. Inst. § 959; Nicholls v. Webb, 8 Wheat. 333; Townsley v. Sumrall, 2 Pet. 179; Wilson v. Stewart, 1 Cranch C. C. 128; Orr v. Lacy, 4 McLean, 243; Pattee v. McCrillis, 53 Me. 410; Rushworth v. Moore, 36 N. H. 188; Austin v. Wilson, 24 Vt. 630; Union Bk. v. Gregory, 46 Barb. 98; Barker v. Ketchum, 7 Hill (N. Y.), 444; McAndrew v. Radway, 34 N. Y. 511; Lawson v. Pinckney, 40 N. Y. Sup. Ct. 187; Dunn v. Devlin, 2 Daly, 122; Baumgardner v. Reeves, 35 Penn. St. 250; Ricketts v. Pendleton, 14 Md. 320; Elliott v. White, 6 Jones (N. C. L.), 98; Field v. Thornton, 1 Ga. 306; Booker v. Lowry, 2 Ala. 390; Rives v. Parmley, 18 Ala. 256; Spann v. Baltzell, 1 Fla. 301; Rowley v. Berrian, 12 Ill. 198; Carruth v. Walker, 8 Wise. 252; Fellows v. Menasha, 11 Wise. 550; Johnson v. Cocks, 12 Ark. 672; McFarland v. Pico, 8 Cal. 626; Tyler v. Bank, 7 T. B. Monr. 555; Moore v. Bank, 6 Mo.

379; Williams v. Turner, 2 Bay, 411. *Contra*, at common law, as to inland bills of exchange or promissory notes: Carter v. Burley, 9 N. H. 558; Dutchess Co. Bk. v. Ibbotson, 5 Den. 110; Kirtland v. Wanzer, 2 Duer, 278; Hatfield v. Perry, 4 Harr. (Del.) 463; Bond v. Bragg, 17 Ill. 69. And so as to presentments of notes, for payment out of state: Dutchess Co. Bk. v. Ibbotson, 5 Denio, 510; Schoneman v. Tegley, 7 Penn. St. 433; Coleman v. Smith, 26 Penn. St. 255; corrected by Starr v. Sanford, 45 Penn. St. 193.

³ McAfee v. Doremus, 5 How. 53; Bank of Rochester v. Gray, 2 Hill (N. Y.), 227; Tieknor v. Roberts, 11 La. 14; Ray v. Porter, 42 Ala. 327.

⁴ Talcott v. Ins. Co. 2 Wash. C. C. 449; Welsh v. Barrett, 15 Mass. 380; Foster v. Davis, 1 Litt. (Ky.) 71; Moore v. Worthington, 2 Dav. 307.

⁵ Boggs v. Bank, 10 Ala. 970; Winchester v. Winchester, 4 Humph. 151. See Chatham Bk. v. Allison, 15 Iowa, 357; Brandon v. Loftus, 4 How. (Miss.) 127.

⁶ McKellar v. Peck, 39 Tex. 381.

⁷ Dale v. Wright, 59 Mo. 110.

is but *primâ facie* proof;¹ and it is not exclusive proof. Notice and protest may be proved by other competent evidence.² For such purpose the admission of the party charged is competent.³ And the notary may himself prove the facts, although he has duly entered them in an official registry, which he has preserved.⁴ By the law merchant the protest is not proof that the notices of dishonor were properly addressed, or that notice was properly given. When the bill has been protested, the official duties of the notary, under that law, are closed.⁵ But in most jurisdictions a certificate of the notary is by statute, if not by local usage, *primâ facie* evidence of all the facts it avers.⁶ At the same time if the certificate avers notice to the indorsers at a particular place, or by a particular agent, there must be proof that they lived in such place, or acknowledged such agent.⁷ Nor

¹ See cases just cited, and 2 Daniel v. Lightfoot, 11 Ala. 935. It is plain that when the notary acts only as agent for a party, he is only bound to such party. Morgan v. Van Ingen, 2 Johns. R. 204.

² March v. Garland, 20 Me. 24; New Haven Bk. v. Mitchell, 15 Conn. 206; Cole v. Jessup, 10 N. Y. 96; Bank v. Woods, 28 N. Y. 545; Bell v. Bank, 7 Gill, 216; Wetherall v. Garrett, 28 Md. 450; Eddy v. Peterson, 22 Ill. 535; Ball v. Bank, 8 Ala. 590; Lathrop v. Lawson, 5 La. An. 238; Bank of Ky. v. Duncan, 4 Bush, 294.

³ Derickson v. Whitney, 6 Gray, 248; Long v. Crawford, 18 Md. 220.

⁴ Draper v. Clemens, 4 Mo. 52; Adams v. Wright, 14 Wis. 408; Terbell v. Jones, 15 Wis. 253.

⁵ Dickens v. Beal, 10 Pet. 582; Williams v. Putnam, 14 N. H. 510; Morgan v. Van Ingen, 2 Johns. 204; Miller v. Hackley, 5 Johns. 384; Bank of Rochester v. Gray, 2 Hill, 231; Walker v. Turner, 2 Grat. 536; Bank of Mobile v. King, 9 Ala. 279; Sullivan v. Deadman, 19 Ark. 484; Rives v. Parmley, 18 Ala. 256. See Castles v. McMath, 1 Ala. 326; Leigh

v. Lightfoot, 11 Ala. 935. It is plain that when the notary acts only as agent for a party, he is only bound to such party. Morgan v. Van Ingen, 2 Johns. R. 204.

⁶ Beekwith v. Man. Co. 26 Me. 45; Ticonic Bk. v. Stackpole, 41 Me. 321; Lewiston Bk. v. Leonard, 43 Me. 144; Housatonic Bk. v. Laffin, 5 Cush. 546; Union Bank v. Middlebrook, 33 Conn. 95; Bank of Rochester v. Gray, 2 Hill, 231; Starr v. Sanford, 45 Penn. St. 193; Bank of the Com. v. Mudgett, 44 N. Y. 511; Crawley v. Barry, 4 Gill, 191; Fisher v. Bank, 7 Blackf. 610; O'Neil v. Dickson, 11 Ind. 253; Brooks v. Day, 11 Iowa, 46; Walker v. Bank, 3 Va. 486; Southern Bk. v. Mech. Bk. 27 Ga. 252; Rives v. Parmley, 18 Ala. 256; Bank of Ky. v. Goodale, 20 La. An. 50; McFarland v. Pico, 8 Cal. 626. In Parsons on Notes and Bills, 408, it is contended that this holds good at common law.

⁷ Turner v. Rogers, 8 Ind. 139; Bradshaw v. Hedge, 10 Iowa, 402; Drumm v. Bradfute, 18 La. An. 680.

is the notary's recital proof that the drawee had no funds.¹ Nor can the protest be stretched to make it evidence of any collateral facts which it does not specifically aver, unless such facts are involved in facts which are averred.² When, however, a fact is averred to be done by the protest, the presumption is that it was done regularly.³

§ 124. Evidence of a conflicting local custom is inadmissible to vary the duties imposed on the notary by the law merchant.⁴ If a custom be recognized in this respect, it must be not only

¹ *Dakin v. Graves*, 48 N. H. 45.

² *Dakin v. Graves*, 48 N. H. 45; *Yong v. Bennett*, 18 Penn. St. 261; *Paine v. Rice*, 2 Patt. & H. 530; *Dumont v. Pope*, 7 Blackf. 367; *Turner v. Rogers*, 8 Ind. 140; *Sullivan v. Deadman*, 19 Ark. 486.

³ *Infra*, § 1311, 1318; *Bank U. S. v. Smith*, 11 Wheat. 171; *Pattee v. McCrillis*, 53 Me. 410; *Simpson v. White*, 40 N. H. 540; *Union Bk. v. Middlebrook*, 33 Conn. 95; *Bank of Commerce v. Mudgett*, 44 N. Y. 514; *Coleman v. Smith*, 26 Penn. St. 255; *Nelson v. Fotherall*, 7 Leigh, 179; *Stainback v. Bank*, 11 Grat. 260; *Elliott v. White*, 6 Jones (N. C.), 98; *Whaley v. Houston*, 12 La. An. 585; *Wamsley v. Rivers*, 34 Iowa, 466; *McFarland v. Pico*, 8 Cal. 626. See *Magoun v. Walker*, 48 Me. 420; *Seneca Bk. v. Neass*, 5 Den. 329. See discussion on this topic in *Byles on Bills*, 254; 2 *Daniels on Negot. Inst.* § 963 *et seq.*

Of the New York statute we have the following authoritative construction:—

"It is provided by statute (Laws of 1823, chap. 271, § 8), that in all actions at law the certificate of a notary, under his hand and seal, of the presentment by him of any promissory note for payment, and of the protest thereof for non-payment, shall be presumptive evidence of the facts con-

tained in the certificate, unless the defendant shall annex to his plea an affidavit denying the fact of having received notice of non-payment of such note. Here the defendant served an affidavit denying the receipt by him of notice of non-payment, but it was not annexed to his answer, and hence cannot have the effect mentioned in the statute. It is claimed, however, that the sworn answer of the affidavit was an answer within the meaning of the statute. This claim is not well founded. This answer is verified in the usual way, the affiant affirming that it is true of his own knowledge, except as to the matters stated on information and belief, and as to such matters that he believes it to be true. When a defendant verifies an answer in this way, it is impossible to tell what facts he states upon his own knowledge, and what upon information and belief. An affidavit denying, upon information and belief, the receipt of notices, would not answer the requirements of this statute. To destroy the effect of the certificates of the notary as presumptive evidence, the defendant must deny positively the receipt of notice." *Earl, C., Gawtry v. Doane*, 51 N. Y. 89.

⁴ *Commercial Bk. v. Varnum*, 3 Lansing, 86.

general but pertinent.¹ The entries of a deceased notary, in the course of his business, are, as is elsewhere seen, admissible.²

§ 125. The general rule, says Mr. Taylor,³ is that a duplicate, made out at any time from the original or protocol in the notarial book, is equivalent to an original drawn up at the time of the entry in the book. If, therefore, a foreign bill of exchange be protested for non-payment, or if it be paid under protest for the honor of an indorser, the fact of the protest may be *primarily* established, not only by producing a formal instrument of protest, extended by the notary from his register at the date of the actual protest, but by putting in evidence a duplicate protest, even though it may have been drawn up after the commencement of the action, provided that the entries in the notary's book can be shown to have been made at the time when the transactions occurred.⁴

Duplicate
protests are
admissible
as original.

§ 126. In England, under the acts authorizing the registration of deeds, in Yorkshire and Middlesex, the registrars are bound, if required, to give certificates of searches, and also certified copies of any recorded or registered documents within the purview of the statute. The certificates must be under the hand of the registrar, testified to by two credible witnesses.⁵ In Pennsylvania it has been held admissible to prove by a certificate of the proper recorder or register, that he has searched in his office for a particular paper, without being able to find it.⁶

Searches
of deeds
admissible.

§ 127. Public documents cannot, without great inconvenience to the public, be put in evidence in their originals.⁷ It has been consequently held that such documents, like statutes, may be proved by the printed volumes in which they are published by authority.⁸

Copies of
public doc-
uments re-
ceivable.

¹ *Ocean Bk. v. Williams*, 102 Mass. 141.

² *Infra*, § 251.

³ *Ev.* § 394.

⁴ *Geralopulo v. Wieler*, 10 C. B. 712.

⁵ *Taylor's Ev.* § 1461. See *supra*, § 80.

⁶ *Weidman v. Kohr*, 4 Serg. & R. 174. See, however, *Wayland v.*

Ware, 109 Mass. 218, and cases cited *supra*, § 120.

⁷ See *Carpenter v. Dexter*, 8 Wall. 513.

⁸ *Supra*, § 108; *infra*, § 317; *Watkins v. Holman*, 16 Pet. 26; *Bryan v. Forsyth*, 19 How. U. S. 334; *Gregg v. Forsyth*, 21 How. U. S. 179; *Whiton v. Ins. Co.* 109 Mass. 24; *Dutillet v. Blanchard*, 14 La. An. 97; *Nixon v.*

IV. SECONDARY EVIDENCE MAY BE RECEIVED WHEN PRIMARY IS UNPRODUCIBLE.

§ 129. Where a document (and under this head fall deeds, records, letters, notes, accounts, wills) is lost or destroyed without any suspicion of spoliation attaching to the party offering to prove it by parol evidence, then such parol evidence is admissible to prove its contents, it appearing that due, but fruitless, efforts have been made to

Lost or
destroyed
document
may be
proved by
parol.

Porter, 34 Miss. 697. As to foreign public documents promulgated in the United States, see *supra*, § 108; *infra*, § 317.

In England, royal proclamations, and orders and regulations issued under the authority of government, may be proved, like other public documents, by producing either their originals, or examined copies; and in addition to these obvious modes of proof, others have been afforded and defined by "The Documentary Act, 1868" (2 Bl. Com. 346). Sec. 2 of that useful statute enacts that "*primâ facie* evidence of any proclamation, order, or regulation (this act is made specially applicable to 'any regulation made by the secretary of state in pursuance of' the Naturalization Act, 1870, 33 & 34 Vict. c. 14, § 12, subs. 5), issued before or after the passing of this act by or under the authority of any such department of the government, or officer, as is mentioned in the first column of the schedule hereto, may be given in all courts of justice, and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned, that is to say:—

"(1.) By the production of a copy of the Gazette purporting to contain such proclamation, order, or regulation.

"(2.) By the production of a copy of such proclamation, order, or regu-

lation issued by Her Majesty or by the Privy Council, of a copy or extract purporting to be certified to be true by the clerk of the Privy Council, or by any one of the lords or others of the Privy Council, and, in the case of any proclamation, order, or regulation, issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule, in connection with such department or officer.

"Any copy or extract made in pursuance of this act may be in print or in writing, or partly in print and partly in writing.

"No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this act, to the truth of any copy of or extract from any proclamation, order, or regulation."

Secs. 3 and 4 relate to matters of minor importance. Sec. 5 enacts, that "the following words shall in this act have the meaning hereinafter assigned to them, unless there is something in the context repugnant to such construction (that is to say):—

"'British colony and possession' shall for the purposes of this act include the Channel Islands, the Isle of Man, and such territories as may for the time being be vested in Her Majesty, by

produce it in court; ¹ though, if the instrument were executed in duplicate or triplicate, &c., the loss of all the parts must be proved, in order to let in secondary evidence of its contents.² But this exception does not from its very limitations apply to cases

virtue of any act of parliament for the government of India and all other Her Majesty's dominions:

“ ‘Legislature’ shall signify any authority, other than the Imperial Parliament or Her Majesty in Council, competent to make laws for any colony or possession:

“ ‘Privy Council’ shall include Her Majesty in Council, and the lords and others of Her Majesty's Privy Council, or any of them, and any Committee of the Privy Council that is not specially named in the schedule hereto:

“ ‘Government printer’ shall mean and include the printer to Her Majesty, and any printer purporting to be the printer authorized to print statutes, ordinances, acts of state, or any other public acts of the legislature of any British colony or possession, or otherwise, to be the government printer of such colony or possession:

“ ‘Gazette’ shall include ‘The London Gazette,’ ‘The Edinburgh Gazette,’ and ‘The Dublin Gazette,’ or any of such gazettes.”

Sec. 6 enacts, that the provisions of this act shall be deemed to be in addition to, and not in derogation of, any powers of proving documents given by any existing statute or existing at common law.” Taylor's Ev. § 1371 *a*.

So, all proclamations, treaties, and other acts of state of any foreign state or of any British colony, may be proved either by examined copies, or by copies *purporting* to bear the seal of the state or colony to which they respectively belong. 14 & 15 Viet. c. 75. In one case, where a book was tendered in evidence which purported to be a collection of treaties concluded by America, and was declared to have

been published by authority there, as a regular copy of the archives in Washington; and it was further proposed to prove, by the American minister resident at this court, that the book was the rule of his conduct, Lord Ellenborough rejected the evidence, observing that he would not have admitted a book of Spanish treaties, though proved to have been printed by the king's printer in that country. *Richardson v. Anderson*, 1 Camp. 65, note *a*.

¹ *Doe v. Witcomb*, 6 Exc. R. 601; *R. v. Johnson*, 7 East, 66; *Brewster v. Sewell*, 3 B. & A. 303; *U. S. v. Reymburn*, 6 Pet. 352; *Winn v. Patterson*, 9 Pet. 663; *Renner v. Bank*, 9 Wheat. 581; *Butler v. Maples*, 9 Wall. 766; *Hedrick v. Hughes*, 15 Wall. 123; *Small v. Pennell*, 31 Me. 267; *Tucker v. Bradley*, 33 Vt. 324; *Oatman v. Barney*, 46 Vt. 594; *Jones v. Fales*, 5 Mass. 101; *Pruden v. Alden*, 23 Pick. 184; *Augur v. Whittier*, 118 Mass. 532; *Chamberlin v. Man. Co.* 118 Mass. 532; *Livingston v. Rogers*, 1 Caines, 27, 488; *Ford v. Wadsworth*, 19 Wend. 334; *Enders v. Sternbergh*, 2 Abb. (N. Y.) App. 31; *McReynolds v. Longenberger*, 57 Penn. St. 13; *Kaul v. Lawrence*, 73 Penn. St. 110; *Hayward v. Carroll*, 4 Har. & J. 518; *Allen v. Parish*, 3 Ohio, 107; *Sanders v. Sanders*, 24 Ind. 133; *Richley v. Farrell*, 69 Ill. 264; *Wickenkamp v. Wickenkamp*, 77 Ill. 92; *Marlow v. Marlow*, 77 Ill. 633; *Bagley v. McMickle*, 9 Cal. 439; *Pollock v. Wilcox*, 68 N. C. 46; *Nolen v. Gwyn*, 16 Ala. 725; *Gracie v. Morris*, 22 Ark. 415.

² *R. v. Castleton*, 6 T. R. 236; *B. N. P.* 254; *Alivon v. Furnival*, 1 C. M. & R. 292. *Supra*, § 74.

where the party could in any way procure the paper. Thus it has been held inadmissible for a party to prove by parol a paper sent by him to the clerk of the proper public office to be recorded.¹

§ 130. Secondary evidence may also be offered to prove the substance of a document which it is out of the power of the party to produce.² This right has been held to apply to papers in the hands of an attorney who could not be compelled to deliver them up,³ though it is otherwise if the delivery could be compelled;⁴ to papers fraudulently concealed by the opposite party;⁵ to papers out of the jurisdiction of the court;⁶ provided due efforts be made to obtain the deposition of the person holding the papers.⁷

¹ *Hawkins v. Rice*, 40 Iowa, 435; *Allen v. Parish*, 3 Ohio, 107.

² *Dyer v. Smith*, 12 Conn. 384; *Denton v. Hill*, 4 Hayw. 73; *Cooper v. Day*, 1 Rich. S. C. Eq. 26.

³ *Lynde v. Judd*, 3 Day, 499.

⁴ *Bird v. Bird*, 40 Me. 392.

⁵ *Marlow v. Marlow*, 77 Ill. 633.

⁶ *Burton v. Driggs*, 20 Wall. 133; *Burnham v. Wood*, 8 N. H. 334; *Beatlie v. Hilliard*, 55 N. H. 428; *Binney v. Russell*, 109 Mass. 55; *Forrest v. Forrest*, 6 Duer, 102; *Black v. Camden R. R.* 45 Barb. 40; *Ralph v. Brown*, 3 Watts & S. 395; *Moody v. Com.* 4 Mete. (Ky.) 1; *Underwood v. Lane*, 1 Dev. (N. C.) 173; *Lunday v. Thomas*, 26 Ga. 537; *Shorter v. Shepard*, 33 Ala. 648; *Brown v. Wood*, 19 Mo. 475; *Gordon v. Searing*, 8 Cal. 49.

⁷ *McGregor v. Montgomery*, 4 Penn. St. 237; *Dickinson v. Breeden*, 25 Ill. 186; *Wood v. Cullen*, 13 Minn. 394.

"The next assignment of error is the admission in evidence 'of such parts of the deposition of A. L. Turner and C. P. Steers as refer to what appeared or did not appear on the books of the Tioga County Bank.' It was shown by the plaintiff in this connection that the books in question were in the village of Tioga, Pennsylv-

ania, that the plaintiff had endeavored to obtain them for use on this trial, and that those having the custody of them refused to permit them to go. The testimony of Turner was, in substance, that he was cashier; that he had examined the books and papers in the bank relating to its affairs from its organization down to July, 1859, and that he found no evidence of any kind that the defendant ever had any connection or transaction with the bank, or any interest in it whatever; and that subsequently, at the request of the plaintiff and for the purposes of this suit, he repeated the examination with the same result. Steers testified that he was cashier of the bank from about the 15th of September, 1858, to about the 29th of April, 1859, and that during that time the defendant, Burton, did not furnish to the bank \$7,060.18, or any other sum of money; that his name was never on the books of the bank, nor did the bank owe him anything on any account during that period, and that the witness did not think his name appeared on the books of the bank as a stockholder during that time. The books being out of the state and beyond the jurisdiction of the court, secondary evidence to prove their

§ 131. The same recourse is allowed whenever, for technical grounds, the original cannot be produced. "As soon as a party has accounted for the absence of the original document, he is at liberty to give any kind of secondary evidence. The rule is, that no evidence is to be adduced which *ex naturâ rei* supposes still greater evidence behind in the party's own power and possession;"¹ and therefore oral evidence of an original may be substituted for an attested copy, which was tendered but rejected for want of a stamp.² The same right attaches as to instruments of the possession of which a party is deprived by fraud.³

§ 132. Yet it does not follow that because the paper is destroyed by the party himself, that secondary proof of its contents is inadmissible. Undoubtedly such is the case if the destruction was fraudulent on his part.⁴ It is otherwise, however, when it was innocent or casual.⁵ Nor does it exclude such proof that the original was destroyed with the consent of both parties.⁶

Accidental destruction of a document by a party does not preclude from this resort.

§ 133. When a document is lost, a press copy or a photograph of such document, has, as has been already noticed, high probative value. Next in value are copies sworn to as accurate by those by whom they were made. Such copies, when so sworn to, are necessarily more reliable than memoriter statements of the contents of a document.⁷ Thus, a

Copies of such lost documents receivable.

contents was admissible. When it is necessary to prove the results of voluminous facts or of the examination of many books and papers, and the examination cannot be conveniently made in court, the results may be proved by the person who made the examination. 1 Greenleaf's Evidence, § 93. Here the object was to prove not that the books did, but that they did not show certain things. The results sought to be established were not affirmative, but negative. If such testimony be competent as to the former, *a multo fortiori* must it be so to prove the latter." Swayne, J., *Burton v. Driggs*, 29 Wallace, 133.

¹ Per Parke, B., *Doe v. Ross*, 7 M. & W. 102.

² *Ibid.* See *Hutchins v. Scott*, 2 M. & W. 809; *Rumsey v. Sargent*, 21 N. H. 397; *Lea v. Hopkins*, 7 Penn. St. 492; *Hickey v. Hinsdale*, 12 Mich. 99; and other cases cited *infra*, § 1121.

³ *Infra*, §§ 1264-70; *Grimes v. Kimball*, 3 Allen, 518; *Reed v. Dickey*, 1 Watts, 152.

⁴ See *infra*, §§ 1264-70.

⁵ *Riggs v. Tayloe*, 9 Wheat. 483; *Tobin v. Shaw*, 45 Me. 331; *Stoddard v. Mix*, 11 Conn. 12; *Sturtevant v. Robinson*, 18 Pick. 175; *Orne v. Cook*, 31 Ill. 238; *Adams v. Guice*, 30 Miss. 397; *Bagley v. McMickle*, 9 Cal. 430; *People v. Dennis*, 4 Mich. 609.

⁶ *Gould v. Lee*, 55 Penn. St. 99.

⁷ *Winn v. Patterson*, 9 Pet. 663;

letter book of a party, sworn to by himself or his clerk, will be received as proof of the contents of a lost letter;¹ nor will a party who has or may obtain such a copy, but withholds it, be permitted to prove portions of such letter, or give orally its imperfect substance.² But even a letter-press copy cannot, it is said, be treated as an original.³ And a copy must be proved by a witness who has compared it with the lost original.⁴ A copy of a copy, it need scarcely be added, is inadmissible.⁵

§ 134. In default of better proof of the contents of lost papers, a witness, in supplying such contents, may refresh his memory by abstracts whose correctness he can verify.⁶ So the minutes of the acknowledgment of a treasurer's deed, kept by a prothonotary, have been received in order to prove such deed when lost.⁷ So the drafts from which, by indorsements upon them, it appeared that certain deeds were engrossed, have been held good secondary evidence of the contents of such deeds.⁸ So the abstracts of deeds shown to have been destroyed by fire have been properly received.⁹

§ 135. The same liberty to reproduce is applied to records. When lost or destroyed, they may be proved either by copy, or by the recollection of witnesses.¹⁰ In such case,

Evans v. Bolling, 8 Port. (Ala.) 546; *Williams v. Waters*, 36 Ga. 454; *Peirce v. Bank*, 1 Swan, 265. See fully, *supra*, § 90.

¹ *Supra*, § 93.

² *Dennis v. Barber*, 6 Serg. & R. 420; *Merritt v. Wright*, 19 La. An. 91. See, however, as to degrees of secondary evidence, *supra*, § 90.

³ *Chapin v. Siger*, 4 McL. 378; *Merritt v. Wright*, 14 La. An. 91. See *supra*, § 90.

⁴ *McGinniss v. Sawyer*, 63 Penn. St. 259. See *supra*, § 94.

⁵ *Foot v. Bentley*, 44 N. Y. 171; *Everingham v. Roundell*, 2 M. & Rob. 138; *Liebman v. Pooley*, 1 Stark. R. 167.

⁶ *Burton v. Driggs*, 20 Wall. 133 (cited fully *infra*, § 137); *Sizer v. Burt*, 4 Denio, 426; *Ins. Co. v. Weide*, 9 Wall. 677; *Mayson v. Beazley*, 27 Miss. 106. See *infra*, § 516 *et seq.*

⁷ *Halsey v. Blood*, 29 Penn. St. 319.

⁸ *Waldy v. Gray*, L. R. 20 Eq. 250; 23 W. R. 676; 44 L. J. Ch. 394. *Powell's Evidence*, 4th ed. 352.

⁹ *Richley v. Farrell*, 69 Ill. 264.

¹⁰ *Hedrick v. Hughes*, 15 Wall. 123; *Cornett v. Williams*, 20 Wall. 226; *Gore v. Elwell*, 22 Me. 442; *Foster v. Dow*, 29 Me. 442; *Heywood v. Charlestown*, 43 N. H. 61; *Brown v. Richmond*, 28 Vt. 583; *Thayer v. Stearns*, 1 Pick. 109; *Com. v. Roark*, 8 Cush. 210; *Farmers' Bk. v. Gilson*, 6 Penn. St. 51; *Huzzard v. Trego*, 35 Penn. St. 9; *Miltimore v. Miltimore*, 40 Penn. St. 154; *Clark v. Trindle*, 52 Penn. St. 492; *McKee v. McKee*, 16 Md. 516; *Smith v. Wilson*, 17 Md. 460; *Smith v. Carter*, 3 Rand. 167; *Young v. Buckingham*, 5 Ohio, 485; *Ellis v. Huff*, 29 Ill. 449; *Read v. Staton*, 3 Hayw. 159; *State v. Hare*, 70 N. C. 658; *McQueen*

if there be a certified copy extant, that should be produced,¹ to tax books,² to the minutes of a parish meeting;³ to acts of incorporation,⁴ and to government grants.⁵

§ 136. Hence a copy, when verified, may be received as a substitute for a lost record, loss being duly proved.⁶ So where a record has become illegible from wear and lapse of time, a wit-

v. Fletcher, 4 Rich. (S. C.) 152; *Allen v. State*, 21 Ga. 217; *Bridges v. Thomas*, 50 Ga. 378; *McDade v. Meed*, 18 Ala. 214; *Derrett v. Alexander*, 25 Ala. 265; *Saloy v. Leonard*, 15 La. An. 391; *Eakin v. Vance*, 10 Sm. & M. 549; *Martin v. Williams*, 42 Miss. 210; *Fowler v. More*, 4 Ark. 570; *Norris v. Russell*, 5 Cal. 249; *Rice v. Poynter*, 15 Kans. 263; *Bartlett v. Hunt*, 17 Wise. 214.

¹ "The secondary proof of the judgment in favor of H. H. Williams, against Samuel M. Williams, was properly admitted. The original record was destroyed by fire in the year 1862. The proof in question consisted of a copy of a copy of the judgment, the latter duly certified by the clerk of the court by whom the judgment was rendered. It was proved that the certified copy had been destroyed. The judgment in question was recovered upon a prior judgment in favor of the same plaintiff against the same defendant. There was evidence tending to show that a certified copy of the latter existed, but it was not positive. There was no proof of the existence of such a copy of the judgment sought to be proved. There was a discrepancy as to a single word in the copy offered in evidence. It set forth that the clerk had assessed the damages at 'forty-three thousand nine hundred and *sixty*-six dollars and thirty-four cents, and that it was, therefore, considered by the court that the plaintiff recover of the defendant the sum of forty-three thousand nine hundred and *thirty*-six dollars and

thirty-four cents,' &c. It was satisfactorily proved *aliunde* that thirty, instead of sixty, was correct, the latter being a mistake of the copyist. The principle established by this court as to secondary evidence in cases like this is, that it must be the best the party has it in his power to produce. The rule is to be so applied as to promote the ends of justice and guard against fraud, surprise, and imposition. *Renner v. Bank*, 9 Wheaton, 597; 1 Greenl. Ev. § 84, and note. The copy here in question was properly admitted. *Winn v. Patterson*, 9 Peters, 676. This court has not gone the length of the English adjudications, which hold, without qualification, that there are no degrees in secondary evidence. *Doe d. Gilbert v. Ross*, 7 Mees. & Wels. 106." Swayne, J., *Cornett v. Williams*, 20 Wallace, 245; *S. P., Platt v. Haner*, 27 Mich. 167. See *supra*, § 90.

² *Pittsfield v. Barnstead*, 38 N. H. 115.

³ *Wallace v. First Parish*, 109 Mass. 263.

⁴ *Stockbridge v. West Stockbridge*, 12 Mass. 400; *Blackstone v. White*, 41 Penn. St. 330.

⁵ *U. S. v. Delespine*, 12 Pet. 654; *Lacey v. Davis*, 4 Mich. 149; *Hallet v. Eslava*, 3 St. & P. 105; *Phillips v. Beene*, 16 Ala. 720.

⁶ *U. S. v. Delespine*, 12 Pet. 654; *Kelsey v. Hammer*, 18 Conn. 341; *Blackstone v. White*, 41 Penn. St. 530; *Lipscomb v. Postell*, 38 Miss. 476; *Willets v. Mandlebaum*, 28 Mich. 521; *Hill v. Parker*, 5 Rich. (S. C.) 87; *White v. Barney*, 27 Tex. 50.

ness who has examined and copied it when legible may be called to supply the defect.¹ But parol evidence will not be received of a record of which only part is lost. That which still exists must be produced or exemplified.² Nor is a party permitted to prove orally a record of which he could obtain an office copy unless the record be shown to be lost so that the office copy is unattainable.³ *A fortiori* does this rule exist where the non-production of the original is owing to the conduct of the opposing party.⁴ Lost fragments of record, as we will elsewhere see, may be supplied by certificate.⁵ Ordinarily, however, no summary of a record is admissible.⁶ The whole must be exemplified.

Lost depositions of witness in another state may be thus proved.

§ 137. Under this rule depositions in the same case, which depositions it is out of the power of the party to produce on trial, may be proved by copy in such trial when the witness whose deposition is thus secondarily proved is out of the jurisdiction of the court.⁷

¹ Little v. Downing, 37 N. H. 355. See Coffeen v. Hammond, 3 Gr. (Iowa) 241.

² Nims v. Johnson, 7 Cal. 110.

³ New York Co. v. Richmond, 6 Bosw. 213; Higgins v. Reed, 8 Iowa, 298; Edwards v. Edwards, 11 Rich. (S. C.) 537. See supra, § 90.

⁴ Infra, §§ 1264-70; Thayer v. Stearns, 1 Pick. 109; Gaines v. Kimball, 3 Allen, 518; Meyer v. Barker, 6 Binn. 228; Reed v. Dickey, 1 Watts, 152; Blevins v. Pope, 7 Ala. 371; Bell v. Hearne, 10 La. An. 515.

⁵ See infra, § 828; supra, § 95; Hawkins v. Craig, 1 B. Mon. 27; Coffeen v. Hammond, 3 Gr. (Iowa) 241.

⁶ Armstrong v. Boylan, 1 South. (N. J.) 76; Jay v. East Livermore, 56 Me. 107. See fully, infra, §§ 824-829; and supra, § 95.

⁷ This position is thus explained in the following opinion of the supreme court of the United States:—

“The first assignment of error relates to the admission in evidence of a copy of the deposition of Vine De Pue. The bill of exceptions sets forth

that the original deposition was regularly taken, sealed up, and transmitted to the clerk of the court where the cause was pending, and by him properly opened and filed; and that thereafter it was lost and could not be found; and that the copy offered was a true copy, taken under the direction of the clerk, and by him compared and certified. The exception is as follows: ‘The defendant objected to the copy on the ground that it was not the original. The court overruled the exception and admitted the deposition, to which decision the defendant excepted.’

“It is a rule of law that, where a party excepts to the admission of testimony, he is bound to state his objection specifically, and in a proceeding for error he is confined to the objection so taken. If he assigns no ground of exception, the mere objection cannot avail him. Camden v. Doremus, 3 Howard, 515; Hinde’s Lessee v. Longworth, 11 Wheat. 199. In Hinde’s Lessee v. Longworth, this court said: ‘As a general rule, we think the party

§ 138. Even where a will, which has been duly executed, has been lost, parol evidence is admissible to show that the loss did not arise from an intention of revocation on the testator's part, but that he believed that it was still in existence at the time of his death. In such case, on

Parol evidence admissible to establish lost will.

ought to be confined, in examining the admissibility of evidence, to the specific objection taken to it. The attention of the court is called to the testimony in that point of view only.' Here the objection was that the copy was not the original. This as a fact was self-evident; but as a ground of objection it was wholly indefinite. It does not appear to have been suggested that the place of the lost deposition could only be supplied by another one of the same witness retaken, and that secondary evidence was inadmissible to prove the contents of the former. If the contents of the one lost could be proved at all by such evidence, that offered was certainly admissible for that purpose. But the objection was presented in the argument before us in the latter shape, and we shall consider it so accordingly.

"It is an axiom in the law of evidence that the contents of any written instrument lost or destroyed may be proved by competent evidence. Judicial records and all other documents of a kindred character are within the rule. *Renner v. Bank of Columbia*, 9 Wheaton, 581; *Riggs v. Tayloe*, *ibid.* 483; 1 Greenl. Evidence, § 509. But it is said a different rule as to depositions — unless the witness be dead — obtains in Vermont, and the cases of *Follett v. Murray*, 17 Vt. 530, and *Low v. Peters*, 36 Vt. 177, are referred to as supporting the exception. Those cases are unlike the one before us. In *Follett v. Murray* the witness resided within the state, and, there being no copy of the caption, it did

not appear that the deposition had been regularly taken. In the other case the witness was dead, and no question was raised as to any defect in the lost original. The copy was, therefore, admitted as of course. If a deposition be not properly taken, it is not made admissible by the death of the witness. *Johnson v. Clark*, 1 Tyler, 449. In *Harper v. Cook*, 1 Carrington & Payne, 139, it was held that the contents of a lost affidavit might be shown by secondary evidence. The necessity of retaking, it was not suggested. In the present case the witness lived in another state and more than one hundred miles from the place of trial. The process of the court could not reach him; for all jurisdictional purposes he was as if he were dead. It is well settled that, if books or papers necessary as evidence in a court in one state be in the possession of a person living in another state, secondary evidence, without further showing, may be given to prove the contents of such papers, and notice to produce them is unnecessary. *Shepard v. Giddings*, 22 Connecticut, 282; *Brown v. Wood*, 4 Bennett (19 Missouri), 475; *Teall v. Van Wyck*, 10 Barbour, 376. See, also, *Boone v. Dykes*, 3 Munroe, 532; *Eaton v. Campbell*, 7 Pick. 10; *Bailey v. Johnson*, 9 Cowen, 115; *Mauri v. Heffernan*, 13 Johnson, 58. Here there was nothing to prevent the operation of the general rule as to proof touching writings lost or destroyed. The deposition was one of the files in the case. The plaintiff was entitled to the benefit of the contents of that document.

proof of due execution of the will, probate will be granted of a draft of the will duly proved.¹ So proof has been received to show that a draft, signed by a testator, and indorsed by him, "Intended will," was meant by him as a real will.²

§ 139. Probate will also be granted, under like conditions, when the substance of a lost will can be proved by reliable witnesses.³ Thus, in an English case of great interest, decided in 1876, it was held that declarations, written or oral, made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents. It was also determined that when the contents of a lost will are not completely proved, probate will be granted to the extent to which they are proved.⁴ The fact that a will was duly executed must first be proved beyond reasonable doubt. If proved, however, to have existed, its substance may be proved as may that of any lost document. And though parol evidence to supply the place of a lost will must be strong and positive,⁵ yet when strong and positive it may be received so as to authorize probate.⁶ The testimony of a party interested, whose cred-

Having been lost without his fault, he was not bound to supply its place by another and a different deposition, which might or might not be the same in effect with the prior one.

"There was no error in admitting in evidence the copy to which this exception relates." Swayne, J., *Burton v. Driggs*, 21 Wall. 133.

¹ *Lillie v. Lillie*, 3 Hag. 184; *Brown v. Brown*, 8 E. & B. 876; *Paulton v. Paulton*, 1 Sw. & Tr. 55; *S. C.* 4 Jur. N. S. 341; *Podmore v. Whatton*, 3 Sw. & Tr. 449; *Hobberfield v. Browning*, 4 Ves. 200, n.; *Finch v. Finch*, L. R. 1 Prob. & D. 372; *Jarman on Wills*, 114; 1 *Redfield on Wills*, 168. See *Kitchens v. Kitchens*, 39 Ga. 168.

² *Bone v. Spear*, 1 Phillimore, 345. See *Popple v. Cunison*, 1 Add. 377.

³ *Wharram v. Wharram*, 3 Sw. & Tr. 301; *Moore v. Whitehouse*, 34 L. J. Pr. & Mat. 31; *Body*, in re, 34 L.

J. Pr. & Mat. 55; *Finch v. Finch*, L. R. 1 P. & D. 371; *Burls v. Burls*, L. R. 1 P. & D. 472.

⁴ *Sugden v. Lord St. Leonards*, L. R., P. D. (C. A.) 154, overruling *Quick v. Quick*, 3 Sw. & Tr. 442, as to declarations made after the execution of the will.

⁵ *Lucas v. Brooks*, 23 La. An. 117; *Shepherd v. Brooks*, 23 La. An. 129.

⁶ *Clark v. Wright*, 3 Pick. 87; *Davis v. Sigourney*, 8 Mete. 487; *Johnson's Will*, 40 Conn. 587; *Dan v. Brown*, 4 Cow. 483; *Jackson v. Betts*, 6 Cow. 377; *S. C.* 9 Cow. 205; *Everitt v. Everitt*, 41 Barb. 385; *Howard v. Davis*, 2 Binn. 406; *Jones v. Murphy*, 8 Watts & S. 275; *Youndt v. Youndt*, 3 Grant Cas. 140; *Steele v. Price*, 5 B. Mon. 58; *Morris v. Swaney*, 7 Heisk. 591; *Jackson v. Jackson*, 4 Mo. 210; *Dickey v. Malechi*, 6 Mo. 177.

ibility is beyond suspicion, may be sufficient to prove the substance of the will.¹ A party, however, who could produce a draft of such will, cannot prove it by parol.²

§ 140. To authorize memoriter proof of a lost document, the witness must have read it, or heard its contents from its author, and be able to speak at least to the substance of such contents.³ In testifying he may refresh his memory by abstracts taken by himself.⁴ Such evidence, also, should be supported strongly by circumstances in cases where the probabilities are that a writing of the character of that in dispute would be carefully preserved.⁵ The degree of accuracy with which a witness is expected to speak in this relation is elsewhere more fully discussed.⁶ The admissions of the party himself are sufficient to sustain the accuracy of a copy.⁷ It should be remembered that to prove the contents of a lost writing it is not necessary to call the writer; any witness familiar with the contents is equally admissible.⁸

Witness must have been acquainted with original.

¹ *Sugden v. Lord St. Leonards*, *ut supra*.

² *Ill. Land Co. v. Bonner*, 75 Ill. 315.

³ See *infra*, § 514; *Fisher v. Samuda*, 1 Camp. 193; *Clark v. Houghton*, 12 Gray, 38; *Coxe v. England*, 65 Penn. St. 212; *Rankin v. Crow*, 19 Ill. 626; *Posten v. Rasette*, 5 Cal. 467.

⁴ *Burton v. Driggs*, 20 Wall. 133; *Ins. Co. v. Weide*, 9 Wall. 677; *Sizer v. Burt*, 4 Denio, 426; *Mayson v. Beasley*, 27 Miss. 106. *Infra*, § 516.

⁵ *Moore v. Livingston*, 28 Barb. 543; *Brown v. Austin*, 41 Vt. 262; *Bradbury v. Dwight*, 3 Mete. Mass. 31; *Whitney v. Sprague*, 23 Pick. 198; *Wylie v. Smitherman*, 8 Ired. (N. C.) 236; *Marshall v. Morris*, 16 Ga. 368.

⁶ *Infra*, §§ 514-15.

⁷ *Infra*, § 1091. "It is certainly not to be denied, or even doubted, that to make a copy of a lost instrument of writing admissible, the evidence of the genuineness of the original from which

it was taken must be of the most positive and unequivocal kind. *McKeynolds v. McCord*, 6 Watts, 288; *Slone v. Thomas*, 2 Jones, Penn. 209; *Porter v. Wilson*, 1 Harris, 641. But it does not follow that the only mode of establishing such genuineness is the testimony of a witness who saw the handwriting of the parties, and who knew and was able to identify it as such. If the party sought to be charged should himself hand the paper as genuine to a copyist, that certainly would be such an unequivocal acknowledgment of its genuineness as to dispense with any other evidence. The circumstances in evidence on the trial of this case as to the genuineness of the paper, a copy of which was offered and received, appear to us to be equal to such an acknowledgment." *Sharswood, J., Krise v. Neason*, 66 Penn. St. 258.

⁸ *R. v. Hurley*, 2 M. & Rob. 473; *R. v. Benson*, 2 Camp. 508; *Bank Prosecutions*, R. & R. 378. See *supra*, § 90.

Court must be satisfied that original writing is not producible, and would be evidence if produced.

§ 141. But the production of proof, satisfactory to the court, that it is out of the power of the party to produce the document alleged to be lost, and of its prior existence and genuineness, is a prerequisite condition of the admission of secondary evidence of its contents. The question of such admissibility is for the court.¹

¹ *R. v. Johnson*, 7 East, 66; *Doe v. Whitcomb*, 6 Ex. R. 605; *Brewster v. Sewell*, 3 B. & A. 303; *Gully v. Bishop of Exeter*, 4 Bing. 298; *Pardoe v. Price*, 13 M. & W. 267; *Bouldin v. Massie*, 7 Wheat. 122; *Butler v. Maples*, 9 Wall. 766; *Batchelder v. Nutting*, 16 N. H. 261; *Morrill v. Foster*, 32 N. H. 358; *Brighton Bk. v. Philbrick*, 40 N. H. 506; *Boynton v. Rees*, 8 Pick. 329; *Brackett v. Evans*, 1 Cush. 79; *Stratford v. Ames*, 8 Allen, 577; *Witter v. Latham*, 12 Conn. 392; *Cary v. Campbell*, 10 Johns. R. 363; *Chambers v. Hunt*, 22 N. J. L. 552; *Cau-man v. Congregation*, 6 Binney, 59; *Young v. Mackall*, 3 Md. Ch. 398; *Marshall v. Haney*, 9 Gill, 251; *Morrison v. Welty*, 18 Md. 169; *Beall v. Poole*, 27 Md. 645; *Ben v. Peete*, 2 Rand. 539; *Dawson v. Graves*, 4 Call, 127; *Lungsford v. Smith*, 12 Grat. 554; *Redman v. Green*, 3 Ired. Eq. 54; *Dumas v. Powell*, 3 Dev. (N. C.) L. 466; *Reynolds v. Quattlebum*, 2 Rich. (S. C.) 140; *Holcombe v. State*, 28 Ga. 66; *Bigelow v. Young*, 30 Ga. 121; *Oliver v. Parsons*, 30 Ga. 391; *Hadley v. Bean*, 53 Ga. 685; *Poulet v. Johnson*, 25 Ga. 403; *Cameron v. Kersey*, 41 Ga. 41; *Wiswall v. Knevals*, 18 Ala. 65; *Hussey v. Roquemore*, 27 Ala. 281; *Fralick v. Presley*, 29 Ala. 457; *Glassell v. Mason*, 32 Ala. 719; *Bogan v. McCutchen*, 48 Ala. 493; *Perkins v. Bard*, 16 La. An. 443; *Marks v. Winter*, 19 La. An. 445; *Doe v. McCaleb*, 2 How. (Miss.) 756; *Benton v. Craig*, 2 Mo. 198; *Hanson v. Armstrong*, 22 Ill. 442; *Fisk v. Kisanane*, 42 Ill. 87; *Nixon v. Cobleigh*, 52

Ill. 387; *Sloo v. Roberts*, 7 Ind. 128; *Manson v. Blair*, 15 Ind. 242; *Harlan v. Harlan*, 17 Ind. 328; *Norris v. Russell*, 5 Cal. 249; *Poorman v. Miller*, 44 Cal. 269; *Winona v. Huff*, 11 Minn. 119; *Sternburg v. Callahan*, 14 Iowa, 251; *Johnson v. Mathews*, 5 Kans. 118.

“It is elementary doctrine that the contents of a deed of conveyance lost, destroyed, or suppressed, may be established by parol evidence in an action of ejectment, when its existence as a valid instrument has first been satisfactorily proved. *McReynolds v. McCord*, 6 Wright, 288. The effect of such proof is of equal force in sustaining the title of the grantee as if the deed itself had been presented. This is so *ex necessitate rei*, otherwise titles might be defeated by fraud or accident, without fault on the part of the vendee, and in disregard of the consideration for the conveyance. A rule like this would be so obviously unjust that it could not exist in any civilized land. A near equivalent of such a rule would be any rule which should render such proof impracticable by technical requirements, or to the order of proof; such, for instance, as the requirement of perfect proof in the theory of a first step taken before a second should be attempted. All competent evidence in such a case should be received when offered, whether in logical sequence or not, especially if offered to be followed by what would make out a complete case if believed. When the testimony is in it is the duty of the judge to inform

§ 142. Loss, like all other evidential facts, can be only inferentially proved. In one sense no instrument can be spoken of as lost that is not destroyed, or irrevocably out of the power of the party desiring to produce it. Loss to be inferentially proved. A check or promissory note may be carefully put away in a book, and the place of deposit forgotten. Every effort may be honestly made to find it; it is all the time in the seeker's library, in the very place where he put it; yet after all it may be hopelessly lost. It is not necessary, therefore, to prove exhaustively that the paper exists nowhere. It is sufficient if the party offering parol proof show such diligence as is usual with good business men under the circumstances.¹ But before such evidence will be admissible, it must be shown that the original instrument was duly executed, and was otherwise genuine.² Where the document is one to whose validity attesting witnesses are es-

the jury what the law requires to be extracted from the body of it in order to make out a good and valid case in law, and what effect a failure to do so would have. A party must begin with his proof somewhere; and where, is less important a great deal than its completeness. A judge will look at the latter with great care as being of the very essence of the contest, and at the former as a desirable result rather than an essential one." Thompson, C. J., *Diehl v. Emig*, 65 Penn. St. 326.

¹ *Moore v. Tillotson*, 7 Pet. 99; *Bouldin v. Massie*, 7 Wheat. 122; *U. S. v. Sutter*, 21 How. 170; *Wing v. Abbott*, 28 Me. 367; *Simpson v. Norton*, 45 Me. 281; *Pickard v. Bailey*, 26 N. H. 152; *Brown v. Austin*, 41 Vt. 262; *Taunton Bk. v. Richardson*, 7 Pick. 436; *Hatch v. Carpenter*, 9 Gray, 271; *Kelsey v. Hammer*, 18 Conn. 311; *Jackson v. Neely*, 10 Johns. R. 374; *Voorhees v. Dorr*, 51 Barb. 589; *Leland v. Cameron*, 31 N. Y. 115; *Kingswood v. Bethlehem*, 13 N. J. L. 221; *Clark v. Hornbeck*, 14 N. J. L. 439; *Paul v. Durborow*,

13 Serg. & R. 392; *Parks v. Dunkle*, 3 Watts & S. 291; *Dreisbach v. Berger*, 6 Watts & S. 561; *Flinn v. McGonigle*, 9 Watts & S. 75; *Spalding v. Bank*, 9 Penn. St. 28; *Hemp-hill v. McClimans*, 21 Penn. St. 367; *Graff v. R. R.* 31 Penn. St. 489; *Brown v. Davy*, 78 Penn. St. 179; *Coxe v. Deringer*, 78 Penn. St. 271; *Raab v. Ulrich*, 2 Weekly Notes of Cases, 53; *Prettyman v. Walston*, 34 Ill. 175; *Carr v. Miner*, 42 Ill. 179; *McMillan v. Bothold*, 35 Ill. 250; *Carter v. Edwards*, 16 Ind. 238; *Ellis v. Smith*, 10 Ga. 253; *Harper v. Scott*, 12 Ga. 125; *Roe v. Doe*, 32 Ga. 39; *Hill v. Fitzpatrick*, 6 Ala. 314; *Shields v. Byrd*, 15 Ala. 818; *Johnson v. Powell*, 30 Ala. 113; *Sexton v. McGill*, 2 La. An. 190; *Merritt v. Wright*, 19 La. An. 91; *Williams v. Heath*, 22 Iowa, 519.

² *Goodier v. Lake*, 1 Atk. 416; *R. v. Culpepper*, Skin. 673; *Doe v. Whitefoot*, 8 C. & P. 270; *Jackson v. Frier*, 16 Johns. R. 196; *Hampshire v. Floyd*, 38 Tex. 103, and cases above cited.

sential, the attesting witness must, if known, be called, or in the event of his death, his handwriting must be proved, precisely in the same manner as if the deed itself had been produced; though if it cannot be discovered who the attesting witness was, this strictness of proof will, from necessity, be waived.¹

Or by admission of opponent.

§ 143. The admission of the opposing party, or of his attorney, is sufficient evidence of loss.²

Custodians to be inquired of.

§ 144. If a document has been placed in the hands of a custodian, he must be required to make due search, and the fruitlessness of such search must be shown, before secondary evidence can be let in.³ Where such person is dead, inquiry must be made of his legal representatives, if the matter concerns his personalty, or of his heirs, if it concerns his realty.⁴

§ 145. When there is doubt as to the proper custodian of an instrument, it may be necessary to search all probable places of deposit. Thus, in reference to a lost but expired indenture of apprenticeship, as the apprentice appears to have the greatest interest in its preservation,⁵ stricter inquiry should be made of him than of the master, though, in the absence of positive proof respecting the possession, caution would suggest what the law might not require,⁶ a search among the papers of both. So, upon the loss of a marriage settlement, which, after providing a portion for younger children, and vesting a legal term in trustees to secure it, reserved an ultimate remainder to the settlor's heir, it was held, that a search among the papers of the surviving younger child was insufficient to let in secondary evidence of its contents, and that the papers of the surviving trustee, and of the heir, should also have been examined.⁷

§ 146. A lost expired lease may be looked for in the custody of either lessor or lessee; but, after a considerable interval, it will frequently be found in the landlord's possession, as constitut-

¹ Ibid.; Taylor's Ev. § 434. *Infra*, § 723.

⁴ Taylor's Ev. § 404.

⁵ See *Hall v. Ball*, 3 M. & Gr. 247.

² *R. v. Haworth*, 4 C. & P. 254; *Shortz v. Unangst*, 3 W. & S. 45; *Cooper v. Maddan*, 6 Ala. 431. See *infra*, § 1091.

⁶ *R. v. Hinckley*, 32 L. J., M. C. 158; 3 B. & S. 885, S. C.

⁷ *Cruise v. Claney*, 6 Ir. Eq. R. 552, 556, per Sugden, Ch.; *Richards*

³ *Hart v. Hart*, 1 Hare, 1; *R. v. Piddlehinton*, 3 B. & Ad. 460.

v. Lewis, 11 Com. B. 1035.

ing one of the muniments of his title.¹ It has, however, never been expressly decided that a search among the muniments of the lessor alone would not let in secondary evidence; and Bayley, J., on one occasion, seems to have thought that an examination of the lessee's papers would not be absolutely necessary.²

§ 147. Certain rules, however, have been settled as guiding the judgment of the courts in the exercise of this important function. Thus it is not enough for a party offering secondary evidence simply to swear that he has made general search for the missing paper. To satisfy the court which has the determination of the question of admissibility, search in probable places of deposit must be proved, and the parties last in possession of the paper must, if possible, be examined.³ The search must be by persons having access to probable places of deposit,⁴ and must be recent.⁵ If there be no grounds to impute bad faith, it is enough to show that the paper is not to be found in the place where it was last deposited, or by the

Search in
proper
places
must be
proved.

¹ *Hall v. Ball*, 3 M. & Gr. 242, 253; 3 Scott, N. R. 577, S. C.; *Plaxton v. Dare*, 10 B. & C. 17; 5 M. & R. 1, S. C.; *Elworthy v. Sandford*, 34 L. J. Ex. 42; 3 H. & C. 330, S. C.; *R. v. North Bedburn*, Cald. 452, per Buller, J.; *Doe v. Keeling*, 11 Q. B. 884.

² *Brewster v. Sewell*, 3 B. & A. 301, 302; *Hall v. Ball*, 3 M. & Gr. 247, per Erskine, J.

³ *Gatherecole v. Miall*, 15 M. & W. 319; *R. v. Saffron Hill*, 1 E. & B. 93; *Pardoe v. Price*, 13 M. & W. 267; *Simpson v. Dall*, 3 Wall. 460; *Mason v. Tallman*, 34 Me. 472; *Bartlett v. Sawyer*, 46 Me. 317; *Thrall v. Todd*, 34 Vt. 97; *Goignard v. Smith*, 8 Pick. 272; *Large v. Van Doren*, 14 N. J. Eq. 208; *Jackson v. Frier*, 16 Johns. R. 192; *Dreisbach v. Berger*, 6 W. & S. 564; *Krise v. Neason*, 66 Penn. St. 253; *Clement v. Ruckle*, 9 Gill, 326; *Ringgold v. Galloway*, 3 Har. & J. 451; *Basford v. Mills*, 6 Md. 385; *Roberts v. Haskell*, 20 Ill. 59; *Booth v. Cook*, 20 Ill. 129; *Stow v. People*, 25 Ill. 81; *Holbrook v. Trustees*, 28

Ill. 187; *Chicago R. R. v. Ingersoll*, 65 Ill. 399; *Wing v. Sherrer*, 77 Ill. 200; *Board of Education v. Moore*, 17 Minn. 412; *Adams v. Fitzgerald*, 14 Ga. 36; *Davenport v. Harris*, 27 Ga. 68; *Preslar v. Stallworth*, 37 Ala. 402; *Green v. State*, 41 Ala. 419; *McGuire v. Bank*, 42 Ala. 589; *Chaplain v. Briscoe*, 13 Miss. 198; *Barton v. Murrain*, 27 Mo. 235; *Boyce v. Mooney*, 40 Mo. 104; *Christy v. Kavanagh*, 45 Mo. 375; *Anderson v. Mayberry*, 2 Heisk. 653; *Rash v. Whitney*, 4 Mich. 495.

⁴ *Phillips v. Purington*, 15 Me. 425; *Hammond v. Ludden*, 47 Me. 417; *Dennis v. Brewster*, 7 Gray, 351; *Gaither v. Martin*, 3 Md. 146; *Meek v. Spencer*, 8 Ind. 118; *Rankin v. Crow*, 19 Ill. 626; *Sturgis v. Hart*, 45 Ill. 103; *Horseman v. Todhunter*, 12 Iowa, 230; *Brown v. Tucker*, 47 Ga. 485; *Lawrence v. Burris*, 13 La. An. 611; *Caulfield v. Sanders*, 17 Cal. 569; *King v. Randlett*, 33 Cal. 318; *Taylor v. Clark*, 49 Cal. 671.

⁵ *Porter v. Wilson*, 13 Penn. St. 641. See *Fitz v. Rabbits*, *infra*.

person in whose custody it last was, and that all probable places of deposit have been searched in vain.¹

§ 148. A document of importance may readily be hid away, from excessive care, in a place of peculiar secrecy, yet that place may be forgotten.² A paper of little importance is likely to be swept away and destroyed. Of the latter, therefore, the probabilities of destruction are much greater than of the former; and, in order to let in

¹ *R. v. Saffron Hill*, 1 E. & B. 93; *Hart v. Hart*, 1 Hare, 9; *McGahey v. Alston*, 2 M. & W. 214; *Tyler v. Dyer*, 13 Me. 41; *Moore v. Beattie*, 33 Vt. 219; *Wilter v. Latham*, 12 Conn. 392; *Waller v. School Dist.* 22 Conn. 326; *Francis v. Ins. Co.* 6 Cow. 404; *Kent v. Harcourt*, 33 Barb. 491; *Indianap. R. R. v. Jewett*, 16 Ind. 273; *Conkey v. Post*, 7 Wise. 131; *Edwards v. Edwards*, 11 Rich. (S.C.) 537; *Cooper v. Maddan*, 6 Ala. 431; *Juzan v. Toulmin*, 9 Ala. 662; *Dunn v. Choate*, 4 Tex. 14; *Dunning v. Rankin*, 19 Cal. 640.

When a document's proper place is in a public office, or some other special place of deposit, then it is generally enough to prove a search in such office or place of deposit. Thus secondary evidence of the contents of a warrant, issued by the defendant, has been received on proof by the high constable, who levied under it, that he had deposited it in his office, and had sought for it there in vain; though he added that the town clerk had access to the office, and it was objected that the defendant should have been served with a notice to produce the warrant, and the town clerk with a *subpoena duces tecum*. *Fernley v. Worthington*, 1 M. & Gr. 491.

So, upon the loss of a cancelled check, where it was the duty of a paying clerk of a parish to deposit the cancelled check in a room of the workhouse, an application to the successor of this clerk for an inspection of the

checks in the room, and an ineffectual examination of several bundles which were handed to the party searching by the successor, was deemed a sufficient search to let in secondary evidence, though no notice to produce had been served on the first clerk, he being the defendant in the cause, and though the person who succeeded him in the office was not called. *McGahey v. Alston*, 2 M. & W. 206.

Again, upon the loss of a parish indenture of apprenticeship, where it was shown that the indenture had been given to a person, since dead, to take to the overseers, and a fruitless search was made for it in the parish chest, which was the proper repository for such instruments, secondary evidence was admitted, though none of the overseers were called, and no inquiry was made of the personal representative of the party, who ought to have delivered it to the parish officers. *R. v. Stourbridge*, 8 B. & C. 96.

Immediateness of search is not essential when such search was exhaustively made upon the discovery of the loss. Where it was made amongst the proper papers three years before the trial, this was held sufficient, though it was said that it would have been better had the papers been again examined. *Fitz v. Rabbits*, 2 M. & Rob. 607.

² *Am. Life Ins. Co. v. Rosenagle*, 77 Penn. St. 507.

secondary evidence, much more vigilant search is required for important than for unimportant papers. In an English case, where the defendant was sued for an alleged libel in a paper called *The Non-conformist*,¹ a witness was called, in order to prove the circulation of the libel, who said he was president of a literary institution, which consisted of eighty members; that a number of *The Non-conformist* was brought to the institution, he did not know by whom, and left there gratuitously; that, about a fortnight afterwards it was taken (as he supposed) out of the subscribers' room without his authority, and was never returned; that he had searched the room for it, but had not found it, and never knew who had it; and that he believed it had been lost or destroyed. The judge trying the case ruled that after such proof secondary evidence of the contents of the paper was admissible. The court in banc, on a motion for a new trial, held the ruling to be right, Alderson, B., delivering the judgment, saying, "The question whether there has been a loss, and whether there has been sufficient search, must depend very much on the nature of the instrument searched for; and I put the case, in the course of the argument, of the back of a letter. It is quite clear a very slender search would be sufficient to show that a document of that description had been lost. If we were speaking of an envelope in which a letter had been received, and a person said, 'I have searched for it among my papers, I cannot find it,' surely that would be sufficient. So, with respect to an old newspaper which has been at a public coffee-room; if the party who kept the public coffee-room had searched for it there, where it ought to be if in existence, and where naturally he would find it, and says he supposes it has been taken away by some one, that seems to me to be amply sufficient. If he had said, 'I know it was taken away by A. B.,' then I should have said, you ought to go to A. B., and see if A. B. has not got that which it is proved he took away; but if you have no proof that it was taken away by any individual at all, it seems to me to be a very unreasonable thing to require that you should go to all the members of the club, for the purpose of asking one more than another whether he has taken it away, or kept it. I do

¹ *Gathercole v. Miall*, 15 M. & W. 319. See *R. v. East Fairley*, 6 D. & R. 153.

not know where it would stop; when you once go to each of the members, then you must ask each of the servants, or wives, or children of the members; and where will you stop? As it seems to me, the proper limit is, where a reasonable person would be satisfied that they had *bonâ fide* endeavored to produce the document itself; and therefore I think it was reasonable to receive parol evidence of the contents of this newspaper.”¹

§ 149. At common law, a peculiarly stringent rule was adopted as to negotiable paper. Thus it was held that no action at law could be sustained on a lost bill of exchange, promissory note, or check, or on the respective considerations, provided the instrument had been originally drawn payable to order, or bearer, and provided the fact of the loss had been specially pleaded.² The remedy was held in Eng-

¹ That the degree of search is to be proportioned to the importance of the instrument, see *R. v. Gordon, Pearce & D.* 586; *Brewster v. Sewell*, 3 B. & A. 303; *Pardoe v. Price*, 13 M. & W. 267; *Freeman v. Arkell*, 2 B. & C. 494. See *Bligh v. Wellesley*, 2 C. & P. 400. As to who is the proper custodian, see *infra*, § 194.

“The stringency of the rule requiring search for documents and proof of their loss, in order to make parol evidence of their contents admissible, is proportioned always to the character and value of the documents themselves. These letters were between relatives, and do not appear to have had any such obvious importance as to require care for their preservation. Slight proof of loss, therefore, was sufficient. This principle has uniformly been applied where documents, which from their very nature would have only transitory interest, have been in question. In *The United States v. Doeblor*, 1 Bald. 519, on the trial of an indictment for forging and delivering bank notes, after proof of the fact of forging a large quantity and the delivery of one note, it was held that parol evidence of the con-

tents of a letter from the defendant to an accomplice on the subjects of counterfeit notes, for which the accomplice could not account and had not searched, but believed to be lost, was admitted. The principle extends to documents of more grave significance, if it appears, when the witness is examined, that no rational motive for keeping them existed. A deposition will not be rejected because the witness speaks of papers not produced, if it appears that the papers are such as would not probably be preserved for so great a length of time as had elapsed when the testimony was taken, or are not in the possession or power of the witness or the party offering the deposition. *Tilghman v. Fisher*, 9 Watts, 441. The principle is especially applicable to the contents of family letters received by a witness in a foreign country. The evidence should have been admitted.” *American Life Ins. Co. v. Rosenagle*, 77 Penn. St. 514, Woodward, J.

² *Ramuz v. Crowe*, 1 Ex. R. 167; *Clay v. Crowe*, 8 Ex. R. 295; *Crowe v. Clay*, 9 Ex. R. 604, S. C. in Ex. Ch.; *Hansard v. Robinson*, 7 B. & C. 90; 9 D. & R. 860, S. C.; *Pierson v.*

land to be at equity. In this country less mischief arose from the harshness of this rule, from the fact that our courts administered equity in this respect under common law forms.¹

§ 150. If the document was last seen in the possession of a third party, he must, as will hereafter be seen, be summoned by a *subpœna duces tecum* to produce it, so that his testimony concerning it can be taken in the only way that such testimony is receivable; his declaration concerning loss by strict practice not being receivable in his lifetime, and only cautiously after his death.² But as

Third person, in whose hands is document, must be subpœnaed to produce.

Hutchinson, 2 Camp. 211; 6 Esp. 126, *S. C.*; Mayor v. Johnson, 3 Camp. 324; Davis v. Dodd, 4 Taunt. 602; Champion v. Terry, 3 B. & B. 295; 7 Moore, 130, *S. C.*; Bevan v. Hill, 2 Camp. 381; Woodford v. Whiteley, M. & M. 517. See Alexander v. Strong, 9 M. & W. 733; Lubbock v. Tribe, 3 M. & W. 607; Blackie v. Pidding, 6 Com. B. 196; Charnley v. Grundy, 14 Com. B. 608; Taylor, § 408.

¹ See, as to the equitable doctrine, Wahnsley v. Child, 1 Ves. Sen. 341; Toulmin v. Price, 5 Ves. 238; Ex parte Greenway, 6 Ves. 812; Macartney v. Graham, 2 Sim. 285; Davies v. Dodd, 1 Wils. Ex. 110; Mossop v. Eadon, 16 Ves. 430.

In England the rule has been materially modified by the Common Law Procedure Act of 1854 (17 & 18 Vict. c. 125). The Irish Act, 19 & 20 Vict. c. 102, contains a similar provision in § 90), which in § 87 enacts, that "In case of any action founded upon a bill of exchange or other negotiable instrument," — which last words will include a bank note; McDonnell v. Murray, 9 Ir. Law R. N. S. 495, — "it shall be lawful for a court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given, to the satisfaction of the court or judge, or a master, against the claims of any other per-

son upon such negotiable instrument." See Aranguren v. Scholfield, 1 H. & N. 494; King v. Zimmerman, 40 L. J. C. P. 278. If the payee of a lost note can show that the instrument was never negotiable, as having been originally made payable to himself alone, he cannot, as it would seem, be called upon to give an indemnity under this clause, but the action at law will be sustainable, either on the instrument itself, or on the consideration; because, in such case, the defendant cannot be rendered liable to pay the amount a second time. Wain v. Bailey, 10 A. & E. 616; recognized in Ramuz v. Crowe, 1 Ex. R. 173; Clay v. Crowe, 8 Ex. R. 298. As to what is the effect of the bill being *destroyed*, see Wright v. Ld. Maidstone, 1 Kay & J. 701, per Wood, V. C. See, too, Conflans Quarry Co. v. Parker, 3 Law Rep. C. P. 1; 37 L. J. C. P. 51, *S. C.*; where circular notes having been lost, the party losing them was held not entitled to sue the bankers for money had and received. Taylor's Ex. § 408, from which the above is reduced.

² Walker v. Beauchamp, 6 C. & P. 552; R. v. Denio, 7 B. & C. 620; R. v. Castleton, 6 T. R. 620; R. v. Saffron Hill, 1 E. & B. 93. See R. v. Morton, 4 M. & S. 48; R. v. Fordingbridge, El. Bl. & El. 678; Rusk v. Sowerwine, 3 Har. & J. 97. *Infra*, §§ 376-378.

such testimony is addressed to the court, and as in reference to such testimony the rule between direct and hearsay evidence is not necessarily preserved, such declarations of persons who are likely to know about the document, or to have had it in their custody, have been received to prove loss.¹ It should be remembered that if the witness refuses to produce, and has no lawful excuse for so doing, his omission or refusal does not entitle the party serving him with the subpoena to give secondary evidence of the contents of the document.² It is otherwise, however, when the person who refuses to produce the document is not by law compellable to produce it.³

§ 151. A party himself (independently of statutes enabling him to testify in his own cause) is competent by affidavit to make proof of loss and of due search; and his testimony to this effect, if he be the person in whose custody the paper was, is sufficient to let in secondary proof.⁴

Party may
prove loss
by affidavit.

¹ *R. v. Kenilworth*, 7 Q. B. 652; *R. v. Braintree*, 1 E. & E. 51; *City of Bristol v. Wait*, 6 C. & P. 591.

² *Jesus Coll. v. Gibbs*, 1 Y. & C. Ex. R. 156; *R. v. Llanfaethly*, 2 E. & B. 940.

³ *Doe v. Clifford*, 2 C. & Kir. 448; *Newton v. Chaplin*, 10 C. B. 356. See *Jesus Coll. v. Gibbs*, 1 Y. & C. Ex. R. 156. *Infra*, § 585.

"If a solicitor" (says Mr. Taylor, *Ev.* § 427) "refuses to produce a deed as claiming a lien upon it, secondary evidence of its contents cannot be received, provided the party tendering such evidence be the person liable to pay the solicitor's charges. *Att. Gen. v. Ashe*, 10 Ir. Eq. R. N. S. 309. So, also, if an attorney, who is not acting under special instructions from his client, declines to produce an instrument on the ground of privilege, it may be very questionable whether the client must not be subpoenaed, in order to ascertain whether he also relies on his right to withhold the deed; *Doe v. Ross*, 7 M. & W. 122; *Newton v. Chaplin*, 10 Com. B. 356; *In re Cam-*

eron's Coalbrook, &c. Rail. Co. 25 Beav. 1; and this course will assuredly be prudent, inasmuch as the privilege is, in strictness, not that of the attorney, but that of the client. If, indeed, the attorney can undertake to swear that his client has instructed him not to produce the instrument, it will not be necessary to subpoena the client; for in such a case the court would very properly assume that the client, if called, would continue to be of the same mind." *Phelps v. Prew*, 3 E. & B. 430.

⁴ *Patterson v. Winn*, 5 Pet. 233; *Allen v. Blunt*, 2 Woodd. & M. 121; *Woods v. Gassett*, 11 N. H. 442; *Stevens v. Reed*, 37 N. H. 49; *Bachelor v. Nutting*, 16 N. H. 261; *Adams v. Leland*, 7 Pick. 62; *Hathaway v. Spooner*, 9 Pick. 23; *Brigham v. Curn*, 10 Gray, 329; *Williston v. Williston*, 41 Barb. 635; *Vedder v. Wilkins*, 5 Denio, 64; *Ins. Co. v. Woodruff*, 26 N. J. L. 541; *Steel v. Williams*, 18 Ind. 161; *Wade v. Wade*, 12 Ill. 89; *Fisk v. Kissane*, 42 Ill. 87; *Jones v. Morehead*, 2 B. Mon.

His withholding such an affidavit affords a presumption against him, which, however, is rebutted by proof that the paper never was in his care.¹ But for proof of the prior *existence* and genuineness of such a paper, something more than the party's affidavit is necessary. Such existence and genuineness must be substantially proved.² It is immaterial, however, so far as concerns the order of proof, whether the proof of the existence and execution of the paper, or its loss, be received first, provided both are satisfactorily shown.³

V. SO WHEN DOCUMENT IS IN HANDS OF OPPOSITE PARTY.

§ 152. When it is desired to give secondary evidence of a document in the possession of an opposing party, it is necessary, by the common law practice, to give such party notice to produce the paper a suitable period before the trial.⁴ Thus an extract from a lost letter cannot be proved without calling on the writer to produce his

Notice to produce necessary when document is in the hands of opposite side.

210; *McRae v. Morrison*, 13 Ired. (N. C.) L. 46; *Smith v. Atwood*, 14 Ga. 402; *Poulet v. Johnson*, 25 Ga. 403; *Bass v. Brooks*, 1 Stew. (Ala.) 44; *Glassell v. Mason*, 32 Ala. 719; *Yale v. Oliver*, 21 La. An. 451; *Beachboard v. Luce*, 22 Mo. 168; *Kellogg v. Norris*, 10 Ark. 18; *Wallace v. Wilcox*, 27 Tex. 60; *Fallon v. Dougherty*, 12 Cal. 104. See, as limiting above conclusion, *Viles v. Moulton*, 13 Vt. 510.

¹ *Hanson v. Kelly*, 38 Me. 456; *Foster v. Mackay*, 7 Mete. (Mass.) 531; *Harper v. Hancock*, 6 Ired. (N. C.) L. 121; *Linning v. Crawford*, 2 Bailey, 591.

² *Weatherhead v. Baskerville*, 11 How. 829; *Kimball v. Morrell*, 4 Greenl. 368; *Downing v. Pickering*, 15 N. H. 314; *McPherson v. Rathbone*, 7 Wend. 216; *Lomerson v. Hoffman*, 24 N. J. L. 674; *Baskin v. Sechrist*, 6 Penn. St. 154; *Stone v. Thomas*, 12 Penn. St. 209; *Elmondorff v. Carmichael*, 3 Litt. (Ky.) 472; *Thompson v. Thompson*, 9 Ind. 323; *Owen v. Paul*,

16 Ala. 130; *Hanna v. Price*, 23 Ala. 826; *Millard v. Hall*, 21 Ala. 269; *Gould v. Trowbridge*, 32 Mo. 291; *Stockdale v. Young*, 3 Strobb. 501; *Reynolds v. Jourdan*, 6 Cal. 108.

³ *Fitch v. Bogue*, 19 Conn. 285; *Jackson v. Woolsey*, 11 Johns. R. 446; *Denn v. Pond*, 1 Cox. N. J. 379; *Dowler v. Cushwa*, 27 Md. 351; *Culpepper v. Wheeler*, 2 McMul. 66. See *Shrowders v. Harper*, 1 Harr. (Del.) 444. That execution of such paper must be first proved, see *Kimball v. Morrell*, 4 Greenl. 368; *Jack v. Woods*, 29 Penn. St. 375; *Shrowders v. Harper*, 1 Harr. (Del.) 444; *Elmondorff v. Carmichael*, 3 Litt. (Ky.) 472; *Perry v. Roberts*, 17 Mo. 36; *Atwell v. Lynch*, 39 Mo. 519.

⁴ *Cates v. Winter*, 3 T. R. 306; *Smith v. Sleap*, 1 C. & Kir. 48; *U. S. v. Winchester*, 2 McLean, 135; *Com. v. Emery*, 2 Gray, 80; *Harris v. Whitcomb*, 4 Gray, 433; *Waring v. Warren*, 1 Johns. R. 340; *Foster v. Newbrough*, 58 N. Y. 481; *Milliken v. Barr*, 7 Penn. St. 23; *Carland v. Cum-*

letter book, supposing the letter to be a duplicate original;¹ though an entire duplicate original can be produced without calling on the opposite side for the other.² *A fortiori*, a sworn copy of a letter in the hands of the opposite side cannot be received unless notice to produce be proved.³ Nor can a demand for a paper, prior to suit, be treated as notice to produce;⁴ nor does the fact that the paper had been on record excuse notice, if the record had been destroyed.⁵ A plaintiff, however, has been permitted to testify orally to the amount of an account of sales given by him to the defendant, without giving the defendant notice to produce.⁶

§ 153. After refusal of the party having the instrument to produce it, the party calling for it may produce secondary evidence of its contents.⁷ If the secondary evidence so offered is vague and indistinct, this, it must be remembered, is to be imputed, not to negligence on the part of the party offering it, but to the refusal of the party holding the superior evidence to produce such evidence. And a jury, under such circumstances, will be justified in holding that between two probable interpretations of the secondary evidence, they are authorized to select that most unfavorable

ningham, 37 Penn. St. 228; Anderson v. Applegate, 13 Ind. 339; Marlow v. Marlow, 77 Ill. 633; Patterson v. Linder, 14 Iowa, 414; Ledbetter v. Morris, 1 Jones (N. C.) L. 545; Potier v. Barclay, 15 Ala. 439; Olive v. Adams, 50 Ala. 373; Williams v. Benton, 12 La. An. 91; Lewin v. Dille, 17 Mo. 64; Farmers' Bk. v. Lonergan, 21 Mo. 46; Grimes v. Fall, 15 Cal. 63; Dean v. Border, 15 Tex. 298. For the practice as to inspection of papers, see § 745.

¹ Supra, § 74; Dennis v. Barber, 6 Serg. & R. 420.

² See supra, § 74; Hubbard v. Russell, 24 Barb. 401.

³ Foster v. Newbrough, 58 N. Y. 481.

⁴ Muller v. Hoyt, 14 Tex. 49.

⁵ Murchison v. McLeod, 2 Jones (N. C.) L. 239.

⁶ First Nat. Bk. v. Priest, 50 Ill. 321.

⁷ R. v. Watson, 2 T. R. 201; Partridge v. Coates, Ry. & M. 156; Riggs v. Tayloe, 9 Wheat. 483; Hanson v. Eustace, 2 How. 653; Lowell v. Flint, 20 Me. 401; Thayer v. Middlesex Ins. Co. 10 Pick. 326; Narragansett Bank v. Silk Co. 3 Mete. 282; Loring v. Whittemore, 13 Gray, 228; Com. v. Goldstein, 114 Mass. 272; Augur Co. v. Whittier, 117 Mass. 451; Spring Garden Ins. Co. v. Evans, 9 Md. 1; Stoner v. Ellis, 6 Ind. 152; Smith v. Reed, 7 Ind. 242; Greenough v. Sheldon, 9 Iowa, 503; Bonner v. Ins. Co. 13 Wise. 677; Faribault v. Ely, 2 Dev. (N. C.) L. 67; Bethea v. McCall, 3 Ala. 449; Bright v. Young, 15 Ala. 112; Merwin v. Ward, 15 Conn. 377; Jackson v. Livingston, 7 Wend. 136; West Branch Ins. Co. v. Helfenstein, 40 Penn. St. 289.

to the party refusing, for the reason that if such interpretation be not correct, he could defeat it by producing the paper.¹

§ 154. The rule admitting secondary evidence after notice, has been extended to cases where the document has been proved to be last seen in the hands of the party in interest in the suit, though he be not a party to the record,² and where the document is in the hands of a person in any sense under the control as agent or attorney of the party notified to produce.³ It is no answer to such a notice, that after its reception the party lost possession of the document called for, unless he has given the opposite party due notice of such loss, and of the persons into whose hands the document probably fell.⁴ It is the duty of the party in whose hands the document last was to purge himself, by showing what became of it.⁵ But there must be some evidence, however slight, to charge the party, against whom the secondary evidence is offered, with the document.⁶

¹ *Clifton v. U. S.* 4 How. 242; *Cross v. Bell*, 34 N. H. 83; *Eastman v. Amoskeag*, 44 N. H. 143; *Life Ins. Co. v. Mut. Ins. Co.* 7 Wend. 31; *Barber v. Lyon*, 22 Barb. 622; *Shortz v. Ungunst*, 3 Watts & S. 45; *Beates v. Retallick*, 23 Penn. St. 288; *Rector v. Rector*, 8 Ill. 105. See, however, *Hanson v. Eustace*, 2 How. 653; *Merwin v. Ward*, 15 Conn. 377.

² *Norton v. Heywood*, 20 Me. 359. See *Thomas v. Harding*, 8 Greenl. 417; *King v. Lowry*, 20 Barb. 532.

³ *Sinclair v. Stevenson*, 1 C. & P. 584; *Taplin v. Atty*, 3 Bing. 164; *Baldner v. Ritchie*, 1 Stark. 338; *Rush v. Peacock*, 2 M. & Rob. 279. When there is no such control, then the person holding the document must be subpoenaed to produce. *Supra*, § 150; *Parry v. May*, 1 M. & Rob. 279; *Evans v. Sweet*, R. & M. 83; *Shepard v. Giddings*, 22 Conn. 282; *Bowman v. Wettig*, 39 Ill. 416; *McCreary v. Hood*, 5 Blackf. 316;

McAulay v. Earnhart, 1 Jones (N. C.) L. 502.

⁴ *Sinclair v. Stevenson*, 1 C. & P. 585; *Knight v. Martin*, Gow R. 103; *Jackson v. Shearman*, 6 Johns. R. 19; *Jackson v. Woolsey*, 11 Johns. R. 446.

⁵ *R. v. Thistlewood*, 33 How. St. Tr. 757; *Harvey v. Mitchell*, 2 M. & Rob. 366.

⁶ *Sharpe v. Lamb*, 11 A. & E. 805; *Henry v. Leigh*, 3 Camp. 502.

The authorities as to the fulness required in the notice are thus given by Mr. Taylor (*Evidence*, § 413). It may be difficult to lay down any general rule as to what the notice ought to contain, since much must depend on the particular circumstances of each case; but this much is clear, first, that no misstatement or inaccuracy in the notice will be deemed material, if it be not really calculated to mislead the opponent. *Justice v. Elstob*, 1 Fost. & F. 258; *Graham v. Oldis*, *Ibid.* 262.

§ 155. When the document is in court, a notice given at the trial is generally sufficient;¹ but if it be not in court, the notice must be given a sufficient period before the trial to enable the party called upon conveniently to produce

Notice
must be
timely.

And next, that it is not necessary, by condescending minutely to dates, contents, parties, &c., to specify the precise documents intended. Indeed, it may be dangerous to do so, since if any material errors were to creep into the particulars, the party sought to be affected by the notice might urge, with possible success, that he had been misled thereby.

If enough is stated on the notice to induce the party to believe that a particular instrument will be called for, this will be sufficient. See *Rogers v. Custance*, 2 M. & Rob. 181. Thus, a notice to produce "all letters written by the plaintiff to the defendant, relating to the matters in dispute in the action;" *Jacob v. Lee*, 2 M. & Rob. 33, per Patteson, J.; *Conybeare v. Farries*, 5 Law Rep. Ex. 16; or "all letters written to or received by the plaintiff between the years 1837 and 1841, both inclusive, by and from the defendants, or either of them, or any person in their behalf, and also all books, papers, &c., relating to the subject matter of this cause;" *Morris v. Hauser*, 2 M. & Rob. 392, per Ld. Denman; *C. & Marsh*. 29, *S. C. nom. Morris v. Hannen*; has been held sufficient to let in parol evidence of a particular letter not otherwise specified. In these cases the names of the parties by and to whom the letters were addressed appeared on the no-

tice, and perhaps this circumstance sufficiently distinguishes them from an older decision [this distinction was pointed out and relied upon by Patteson, J., in *Jacob v. Lee*, 2 M. & Rob. 33], where a notice to produce "all letters, papers, and documents, touching or concerning the bill of exchange mentioned in the declaration, and the debt sought to be recovered" (*France v. Lucy, Ry. & M.* 341, per Best, C. J.), was held too vague to admit secondary proof of a notice of dishonor sent by plaintiff to defendant. The authority, however, of this last case has been shaken by a subsequent decision where a notice to produce "all accounts relating to the matters in question in this cause," was held to point out with sufficient precision a particular account relating to a small part of the work, though it appeared that many such accounts for different parts of the work had been rendered by the plaintiff to the defendant. *Rogers v. Custance*, 2 M. & Rob. 179. The case of *Jones v. Edwards, McCl. & Y.* 139, was an action against four defendants, as owners of a sloop, to recover an account for warehousing the rigging of the vessel. In order to prove that one of the defendants was a joint owner, the plaintiff called for a letter, which was stated to have been written nine years before by this defendant to the son of another defendant, and relied upon a "notice

¹ *Dwyer v. Collins*, 7 Exch. 639; *Brandt v. Klein*, 17 Johns. 335; *Anon. Anthon*, N. Y. 199; *McPherson v. Rathbone*, 7 Wend. 216; *Atwell v. Miller*, 6 Md. 10; *Chattes v. Rant*, 20 Oh. 132; *Dana v. Boyd*, 2 J. J. Marsh.

587; *Brown v. Isbell*, 11 Ala. 1009; *Griffin v. Sheffield*, 38 Miss. 359. The party's attorney may be compelled to say whether he has it in court. *Ibid.*; *Rhoades v. Selin*, 4 Wash. C. C. 718. *Infra*, § 585.

it.¹ The question of the length of notice is dependent upon that of the object for which the notice is given. Is it to enable the party served to have the paper in court? Then time enough for this purpose is all that is required. Is it to enable the party served to prepare evidence either to weaken or to fortify the paper called for? This view, though at one time current in England, has now been finally overruled by the court of exchequer; it being held that the sole object of such a notice is to enable the party to have the document in court to produce it if he likes, and if he does not, then to enable the opponent to give secondary evidence. "If," said Parke, B.,² "this (*i. e.* the reason suggested by the above authorities) be the true reason, the measure of the reasonable length of notice would not be the time necessary to produce the document, a comparatively simple inquiry, but the time necessary to procure evidence to explain or support it, a very complicated one, depending on the nature of the case and the document itself and its bearing on the cause." It was therefore ruled that where a party to a suit, or his attorney, has a document with him in court, he may be called on to produce it

to produce letters and copies of letters, and all books relating to the cause."

The court decided that the notice was too uncertain, and no sensible man could entertain a different opinion.

In one case, where the notice misdescribed the title of the cause, it was held to be invalid. *Harvey v. Morgan*, 2 Stark. R. 17. (The notice in that case was entitled "A. & B. assignees of C. & D. v. E." instead of "A. & B. assignees of C. B. v. E.") But as the strict application of this rule, in cases where it is evident that the party served has not been misled, might be productive of serious injustice, it is hoped that at the present day it would not be allowed to prevail, unless the misdescription were of a flagrant nature. Indeed, the court of exchequer has thrown out an intimation to this effect; for where a notice was objected to on the ground that it was entitled

(by mistake) in a wrong court, Mr. Baron Alderson discountenanced the objection, saying: "One does not know where we are to stop. Would the notice be bad if one of the names was spelt wrong? . . . At the time of the decision in *Harvey v. Morgan*, the courts were much more strict than now as to matters of this nature." *Lawrence v. Clark*, 14 M. & W. 251.

¹ *R. v. Hankins*, 2 C. & K. 823; *R. v. Kitson*, Pearce & D. 187; *Shreve v. Dulany*, 1 Cranch C. C. 499; *Durkee v. Leland*, 4 Vt. 612; *Jefford v. Ringgold*, 6 Ala. 544; *Cody v. Hough*, 20 Ill. 43; *Barton v. Kane*, 17 Wise. 37; *Divers v. Fulton*, 8 Gill & J. 202. As to English practice, see Taylor's Ev. § 415; *George v. Thompson*, 4 Dowl. 656; *Atkins v. Meredith*, 4 Dowl. 658; *Meyrick v. Woods*, C. & Marsh. 452; *R. v. Hamp*, 6 Cox C. C. 167.

² *Dwyer v. Collins*, 7 Exch. 639.

without previous notice, and in the event of his refusing, the opposite party may give secondary evidence.¹ But where the time is insufficient to enable the documents to be brought in, and where there is no bad faith or negligence in the party in putting them at a distance,² then the notice is not sufficient to admit secondary evidence.³

§ 156. Notice to produce does not invest the instrument called for with the attribute of evidence; for if it did, testimony incapable of proof might be brought into a case by such notice.⁴ But where A. calls upon B. to produce a document, and B. produces it, this *primâ facie* avoids the necessity of proving such document on A.'s part, where it is relied on by B. as part of his title.⁵ But A. is not obliged to put in evidence the papers called for by him; ⁶ though when A., after notifying B. to produce a paper on trial, takes such paper and inspects it, so as to become acquainted with its contents, then A. is bound to treat the paper, if relevant, as his evidence.⁷ The law in this respect, however, has been modified by the statutes making parties witnesses, and authorizing the compulsory production of papers. Under these statutes it may be argued that a document introduced by compulsion is open to counter-proof.⁸

§ 157. A party is not permitted, after declining to produce a paper, to put it in evidence, after it has been proved by his

¹ See *Reid v. Colcock*, 1 Nott & McC. 592.

² As to this, see *R. v. Wagstaff*, Ry. & M. 327; *S. C.*, 2 C. & P. 123; *Drabble v. Donner*, Ry. & M. 47; *Sturge v. Buchanan*, 10 A. & E. 598.

³ *Leaf v. Butt*, C. & Marsh. 451; *Meyrick v. Woods*, C. & Marsh. 452; *Firkins v. Edwards*, 9 C. & P. 478; *Holt v. Miers*, 9 C. & P. 195; *Byne v. Harvey*, 2 M. & Rob. 89; *Vice v. Anson*, 4 M. & M. 97.

⁴ *Krise v. Neason*, 66 Penn. St. 258; *Moulton v. Mason*, 21 Mich. 364; *McCracken v. McCrary*, 5 Jones (N. C.), L. 399; *Rives v. Thompson*, 41 Ga. 68.

⁵ *Betts v. Badger*, 12 Johns. R.

223; *Jackson v. Kingsley*, 17 Johns. R. 157; *St. John v. Ins. Co.* 2 Duer, 419. See, however, *Rhoades v. Selin*, 4 Wash. 715; *Roger v. Hoskins*, 15 Ga. 270; *Herring v. Rogers*, 30 Ga. 615; *Williams v. Keyser*, 11 Fla. 234.

⁶ *Blight v. Ashley*, Pet. C. C. 15; *State v. Wisdom*, 8 Porter, 511.

⁷ *Wilson v. Bowie*, 1 C. & P. 10; *Calvert v. Flower*, 7 C. & P. 386; *Wharam v. Routledge*, 5 Esp. 235; *Blake v. Russ*, 33 Me. 360; *Clark v. Fletcher*, 1 Allen, 53; *Long v. Drew*, 114 Mass. 77; *Anderson v. Root*, 16 Miss. 362; though see *Austin v. Thompson*, 45 N. H. 113.

⁸ *Moulton v. Mason*, 21 Mich. 364.

opponent by parol. Should he be allowed to do so, he would be able to hold back the paper until he saw whether its parol rendering would be favorable or unfavorable to him, and thus to obtain an unjust advantage over his opponent.¹ The same rule is applied when the party calling for the paper has proved a copy, in which case the holder of the paper cannot produce it, and object to the reading of it without proof by an attesting witness.² Nor can he, after refusing to produce, put the paper into the hands of his opponent's witnesses for cross-examination.³

Party refusing to produce bound by his refusal.

§ 158. If a party called upon to produce a particular paper produces it, and offers to establish its genuineness, the party calling for the paper cannot, if he waive reading the paper, offer secondary proof of its contents. The best proof is the paper itself, and this, unless it be shown to have been tampered with, must be put in evidence.⁴

When paper is produced, opposite party cannot put in secondary proof.

¹ Doon v. Donaher, 113 Mass. 151.

² Jackson v. Allen, 3 Stark. R. 74 ; Doe v. Hodgson, 12 A. & E. 185 ; 2 M. & Rob. 283 ; Edmonds v. Challis, 7 C. B. 413 ; 6 D. & L. 581 ; Collins v. Gashon, 2 F. & F. 47. See Lewis v. Hartley, 7 C. & P. 405 ; Tyng v. U. S. Submarine Co. 1 Hun (N. Y.) 161.

³ Doe v. Cockell, 6 C. & P. 527.

⁴ Stitt v. Huidekopers, 17 Wall. 384.

The Roman law makes the following distinction between a paper voluntarily produced by a party to make out his own case, and a paper he is compelled to produce by call from the opposite side. The *first* he accepts with all its qualifications ; the *second* is not made evidence by the mere fact that it is thus brought into court. As to the first, the party producing is estopped from contesting genuineness. But beyond the recognition of the genuineness and authenticity of the instrument, the effect of production does not extend. Facts stated

in the instrument, outside of such genuineness and authenticity, are in any view open to impeachment by the party producing the instrument. Were it otherwise, as is well argued (Weiske, *Rechtslex.* xi. 659), the damage done to business would be great. A debtor, in rendering his accounts to his creditor, would be able, by introducing entries favorable to himself, at least to make the accounts useless to the creditor. Wherever a qualification is so inwrought in an admission as to form part of it, then necessarily the admission cannot be used against the admitting party without the qualification. But when, to an admission of a contract is attached an independent memorandum, operating to defeat such contract, then such memorandum is to be regarded as unilateral, amounting only to a claim by the party making it, not assented to by the opposing party, and therefore open to attack by the latter. To such a memorandum the maxim, *Qui tacet consentire videtur*, does not apply. The

§ 159. Notice to produce a document is not necessary in tort brought for its conversion or detention or loss;¹ nor in respect to a document described in the pleadings as that on which the suit is brought;² nor when, from any reason connected with the form of suit, the party is bound to know that he is charged with the document and will be required to bring it into court.³ But where the maker of negotiable paper does not deny his signature, the plaintiff, who is not then bound to produce the paper, may object to the defendant's giving secondary evidence of the paper without notice to produce.⁴

Notice not necessary for instrument on which suit is brought.

Nor when the party notified is charged with fraudulently obtaining or withholding the document.

§ 160. Nor is notice to produce necessary when the party notified is charged with fraudulently obtaining the document to be proved;⁵ nor when he is charged with its theft or forgery.⁶

§ 161. If a document is conceded by the party, in whose hands it was last heard from, to have been lost or destroyed, then notice to him to produce is unnecessary. He is estopped by his admission from setting up such

law does not compel a party on whom a claim is made to at once protest against such claim; and *a fortiori*, a party, receiving from another an acknowledgment of indebtedness, coupled with a defeasance, cannot, by retaining such acknowledgment, be regarded as admitting the truth of the defeasance. See this argued at length in Weiske's *Rechtslexicon*, xi. 559.

¹ *Scott v. Jones*, 4 Taunt. 865; *How v. Hall*, 14 East, 274; *Hays v. Riddle*, 1 Sanf. 248.

² *Jolley v. Taylor*, 1 Camp. 143; *Dana v. Conant*, 30 Vt. 246.

³ *Colling v. Treweek*, 6 B. & C. 398; *Scott v. Jones*, 4 Taunt. 865; *Read v. Gamble*, 10 A. & E. 597; *Kellar v. Savage*, 20 Me. 199; *Ross v. Bruce*, 1 Day, 100; *McClellan v. Hertzog*, 6 S. & R. 154.

⁴ *Goodered v. Armour*, 3 Q. B. 956. As to notice to produce deed of which there is a registry, see *supra*, § 114.

⁵ *Dwyer v. Collins*, 7 Ex. R. 639; *Mitchell v. Jacobs*, 17 Ill. 236; *Gray v. Kernahan*, 2 Mill (S. C.), 65; *Morgan v. Jones*, 24 Ga. 155.

⁶ *R. v. Aickles*, 1 Leach, 294; *Bucher v. Jarrett*, 3 Bos. & P. 145; *How v. Hall*, 14 East, 275; *R. v. Downham*, 1 F. & F. 386; *R. v. Elworthy*, Law R. 1 C. C. 103; *Stabe v. Mayberry*, 48 Me. 218; *Nealley v. Greenough*, 25 N. H. 325; *People v. Holbrook*, 13 Johns. R. 90; *Hardin v. Kretsinger*, 17 Johns. R. 293; *Hammond v. Hopping*, 13 Wend. 505; *Forward v. Harris*, 30 Barb. 338; *People v. Kingsley*, 2 Cowen, 522; *Com. v. Messinger*, 1 Binney, 273; *State v. Potts*, 4 Halst. 26; *Pendleton v. Com.* 4 Leigh, 694; *Rose v. Lewis*, 10 Mich. 483; *McGinnis v. State*, 24 Ind. 500; *Hart v. Robinett*, 5 Mo. 11. See, however, *contra*, as to charge of forging deed, *R. v. Ha-worth*, 4 C. & P. 254.

possession of the paper as would make a notice to produce of use.¹

§ 162. It stands to reason that notice to produce a notice is not a prerequisite to proving such notice.²

No notice
needed as
to notice to
produce.

¹ Foster v. Pointer, 9 C. & P. 718; How v. Hall, 14 East, 276; Doe v. Spitty, 3 B. & Ad. 182.

² Philipson v. Chase, 2 Camp. 111; Central Bk. v. Allen, 16 Me. 41; Leavitt v. Simes, 3 N. H. 14; Eagle Bank v. Chapin, 3 Pick. 180; Morrow v. Com. 48 Penn. St. 305; Christy v. Horne, 24 Mo. 242.

"In Philipson v. Chase, 2 Camp. 111, Lord Ellenborough observes: 'I approve of the practice as to notices to quit, and I remember when the point was first ruled by Wilson, J., who said, that if a duplicate of the notice to quit was not of itself sufficient, no more ought a duplicate of the notice to produce, and thus notices might be required *in infinitum*.' The fallacy of this reasoning (says Mr. Taylor, § 420) is ably exposed in 3 St. Ev. 730."

Mr. Taylor, however, argues "that the extension of the exception may be justified partly by the experienced inconvenience attendant on a strict observance of the rule requiring notice; 2 Ph. Ev. 226, n. 5; partly because the secondary evidence that is usually offered of a notice is a copy of the paper sent, which partakes in great measure of the character of a duplicate original; Kine v. Beaumont, 3 B. & B. 291; and chiefly because it constantly happens that the opposite party is well aware, from the nature of the suit, that he will be charged with the possession of the original document. Colling v. Treweek, 6 B. & C. 399, 400, per Bayley, J.; Robinson v. Brown, 6 Com. B. 754, per Maule, J.

"On one or other of these grounds,

it has been held that, in order to let in proof by a copy, if not any species of secondary evidence, no notice is required to produce a notice to quit; Doe v. Somerton, 7 Q. B. 58; Jory v. Orchard, 2 B. & P. 41, per Ld. Eldon; Colling v. Treweek, 6 B. & C. 398, per Bayley, J. See R. v. Mortlock, 7 Q. B. 459; a notice of dishonor; Swain v. Lewis, 2 C. M. & R. 261; 5 Tyr. 998, S. C.; Kine v. Beaumont, 3 B. & B. 288; 7 Moore, 112, S. C.; Ackland v. Pearce, 2 Camp. 601, per Le Blanc, J.; Roberts v. Bradshaw, 1 Stark. R. 28; Colling v. Treweek, 6 B. & C. 398, per Bayley, J. These cases—the first two of which were decided after conferring with the judges of the other courts—put the question beyond all dispute, and overrule the earlier decisions of Langdon v. Kuttis, 5 Esp. 156, and Shaw v. Markham, Pea. R. 165, provided the action be brought upon the bill, but not otherwise. Lanauze v. Palmer, M. & M. 31, per Abbott, C. J." The same indulgence has been extended to notices of actions, or written demands, which are necessary to entitle the plaintiff to recover. Jory v. Orchard, 2 B. & P. 39. So no notice is needed as to bills of costs of solicitors, attorneys, and parliamentary agents delivered pursuant to statute. Colling v. Treweek, 6 B. & C. 394; 9 D. & R. 456, S. C.

"On one occasion, when an action was brought against a surety, on a bond conditioned to pay to the plaintiff, within six months after notice, the sum that should become due from the principal, a notice to produce this notice was held necessary by Lord

Collateral facts as to document may be proved without notice.

§ 163. The mere fact that a letter was sent, can be proved without notice to produce the letter;¹ and so as to facts relating to the existence and execution of the paper and not to its contents.²

Ellenborough, on the ground that it was not a mere notice, but in the nature of a statement of account between the plaintiff and the principal. *Grove v. Ware*, 2 Stark. R. 174. Whether this case would now be considered a binding authority may be well questioned, since in principle it is difficult to distinguish it from several of the cases cited above, in which the notice to produce has been deemed unnecessary. But, be this as it may, the judges have determined, in a case where two parties have become sureties, by a joint and several bond, for the payment, within one month after notice should have been given to

them, of such sum as should be due from their principal, that the service of notice upon one of the parties could not be proved in an action brought against another, by producing the duplicate of the notice, but the first party should have been subpoenaed to produce the original, or to account for its non-production. *Robinson v. Brown*, 3 Com. B. 754. Indeed, the exception would seem to be always inapplicable to cases in which the notice has been served on a third person." Taylor's Evidence, § 42.

¹ *Webster v. Clark*, 30 N. H. 245.

² *Gist v. McJunkin*, 2 Rich. S. C. 154; *Lott v. Macon*, 2 Strobb. 178.

CHAPTER IV.

PRIMARINESS AS TO ORAL TESTIMONY.

I. HEARSAY GENERALLY INADMISSIBLE.

Hearsay in its largest sense convertible with non-original, § 170.

Non-original evidence generally inadmissible, § 171.

Objections to such evidence, § 172.

Acts may be hearsay, § 173.

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Testimony of non-witnesses not ordinarily receivable when reported by another, § 175.

So of public acts concerning strangers, § 176.

II. EXCEPTIONS AS TO WITNESS ON FORMER TRIAL.

Evidence of deceased witness in former trial admissible, § 177.

So of witnesses out of jurisdiction or subsequently incompetent, § 178.

So of insane or sick witness, § 179.

Mode of proving evidence in such case, § 180.

III. EXCEPTION AS TO DEPOSITIONS IN PERPETUAM MEMORIAM.

Practice as to such depositions, § 181.

IV. EXCEPTION AS TO MATTERS OF GENERAL INTEREST AND ANCIENT POSSESSION.

Reputation of community admissible as to matters of public interest, § 185.

Facts of only personal interest cannot be so proved, § 186.

Insulated private rights cannot be so affected, § 187.

Witnesses to such hearsay must be disinterested, § 190.

Declarations of deceased persons pointing out boundaries admissible, § 191.

Declarations must be *ante litem motam*, § 193.

Ancient documents receivable to prove ancient possession, § 194.

Such documents must come from proper custody, § 194-5.

Need not have been contemporaneous possession, § 199.

Verdicts and judgments receivable for same purpose, § 200.

V. EXCEPTION AS TO PEDIGREE, RELATIONSHIP, BIRTH, MARRIAGE, AND DEATH.

Declarations admissible as to pedigree, § 201.

Relationship of declarants necessary to admissibility, § 202.

Pedigree may be proved by reputation, § 205.

Statements of deceased relatives inadmissible, but are to be scrutinized as to motive, § 207.

Such declarations may extend to facts of birth, death, and marriage, § 208.

Writings of deceased ancestor admissible for same purpose, § 210.

And so may conduct, § 211.

Declarations may go to facts from which relationship may be inferred, § 212.

Must have been *ante litem motam*, § 213.

Declarant must be dead, § 215.

Must have been related to the family, § 216.

Dissolution of marriage connection by death does not exclude, § 217.

Relationship must be proved *aliunde*, § 218.

Ancient family records and monuments admissible for same purpose, § 219.

So of inscriptions on tombstones and rings, § 220.

So of pedigrees and armorial bearings, § 221.

Death may be proved by reputation, § 223.
 So may marriage, § 224.
 Peculiarity in suits for adultery, § 225.
VI. EXCEPTION AS TO SELF-DISSERVING DECLARATIONS OF DECEASED PERSONS.
 Such declarations receivable, § 226.
 No objection that such declarations are based on hearsay, § 227.
 Declarations must be self-disserving, § 228.
 Independent matters cannot be so proved, § 231.
 Admissible, though other evidence could be had, § 232.
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 Entries of deceased or non-procurable persons in the course of their business admissible, § 238.
 Entries must be original, § 245.
 Must be contemporaneous and to the point, § 246.
 But cannot prove independent matter, § 247.
 So of surveyors' notes, § 248.
 So of notes of counsel and other officers, § 249.
 So of notaries' entries, § 251.

VIII. EXCEPTION AS TO GENERAL REPUTATION WHEN SUCH IS MATERIAL.
 Admissible to bring home knowledge to a party, § 252.
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X. EXCEPTION AS TO RES GESTÆ.
Res gestæ admissible though hearsay, § 258.
 Coincident business declarations admissible, § 262.
 And so of declarations, coincident with torts, § 263.
 What is done or exhibited at such a time may be proved, § 264.
 Declarations inadmissible if there be opportunity for concoction, § 265.
 Declarations inadmissible to explain inadmissible acts; nor are declarations admissible without acts, § 266.
 Inadmissible if the witness himself could be obtained, § 267.
XI. EXCEPTION AS TO DECLARATIONS CONCERNING PARTY'S OWN HEALTH AND STATE OF MIND.
 Declarations of a party as to his own injuries admissible, § 268.
 So as to his condition of mind when such is at issue, § 269.

I. HEARSAY GENERALLY INADMISSIBLE.

§ 170. MR. BENTHAM,¹ in analyzing unoriginal evidence, gives the following specifications:—

Hearsay, in its largest sense convertible with non-original.

1. Supposed oral through oral; which he defines to be “supposed orally delivered evidence of a supposed extra-judicially narrating witness, judicially delivered *vivâ voce* by the judicially deposing witness;” which he declares to be the only species of unoriginal evidence to which the term “hearsay” is strictly applicable.
2. Supposed oral through “scriptitious,” or written.
3. Supposed scriptitious through oral.
4. Supposed scriptitious through scriptitious.

¹ Rationale of Jud. Ev., Lond. 1827, III. 439, Jas. Mill's ed.

To which may be added, —

5. Supposed material, through oral or scriptitious.

The third and fourth of these modifications have been already partially considered under the general head of secondary evidence. The fifth, as of comparatively unfrequent occurrence, may be noticed at the outset.

§ 171. Suppose, for instance, after a *post-mortem* examination, in a case where poisoning is charged, portions of the remains are given by E., the examining physician (an extra-judicial witness, as Mr. Bentham would call him), to J.; and J. produces these remains on trial, where, under the direction of the court, they are subjected to a chemical analysis. This is hearsay, because E. is not examined on trial to prove the identity of the remains with those which J. produces. Or, after a murder, the deceased's clothes are taken off by E. and handed to J., who brings them into court, and testifies that they are the clothes given to him by E. as having been taken from the body of the deceased. The articles thus produced are hearsay, in the wide sense of the term, and should be rejected.¹ The question of terms is comparatively unimportant. With Mr. Bentham we may call such evidence simply "unoriginal;" with Mr. Best, "second-hand;" or we may fall back, as is here done, upon the general title of hearsay, as designating all testimony from an unoriginal source. It is in this sense that the term "hearsay" is to be used in the following sections.

§ 172. The objections to hearsay testimony, which operate to exclude it when offered on trial, and which are therefore to be considered when we measure the extent to which the exclusion is to be carried, may be enumerated as follows: —

Objections
to such
evidence.

1. *The depreciation of truth arising from its passing through one or more fallible media.* — Mr. Bentham, who argues with great acuteness against the common law exclusion of such evidence, admits the force of this objection. "By every extra-judicial medium the evidence is removed, removed by one *remove*, from that degree of proximity which it were desirable it should possess, and which in the case of ordinary evidence it does possess, with reference to the eye or the ear of the judge." . . . "In

¹ See Wharton, *Crim. Law*, 7th ed. §§ 715, 822.

the case of hearsay evidence (especially if the discourse runs into length), it is frequently impossible for the deposing witness to speak to the very words; and then comes the uncertainty whether, of the words really spoken, the purport attributed to them by the deposing witness be a faithful representation; whether and how far the interpretation put upon them by the deposing witness is correct.”¹ Yet Mr. Bentham’s criticism on this objection has a force which we cannot wholly disregard. We do not consider this fallibility as fatal, he argues, when we report the declarations of a party on trial; we permit, in such a trial (*e. g.* on a trial for murder, in which the defendant’s intent is to be proved by his language), a dozen witnesses to report, according to their own notions, what the defendant said; and the same liberty exists in civil issues, in all cases where extra-judicial declarations of parties are to be shown. The mere fact, therefore, that the language of one man, before it reaches us, passes through the medium of another man’s perception, memory, and expression, is, it is argued, in itself no absolute ground for exclusion. Yet to this criticism it may be replied, that extra-judicial admissions of parties cannot be invoked as similar to extra-judicial statements of third parties not produced on trial, because the former, as we will have hereafter occasion to show, are not so much evidence, as *releases* from evidence,² and are not therefore to be regarded as affording precedents for the treatment of that which is strictly evidence. Did A. do a particular thing? Ordinarily B., the actor in the case against A., has to prove that A. did the thing. But A. says in court, “I admit I did it;” and so far relieves B. from the necessity of proving the fact. Or, we produce what is virtually a release executed by A. before the trial, relieving B. from this necessity; or A.’s intent is to be proved, and a witness is called to prove that A. admitted his intent to be that of the character charged. The witness then proves an admission by A. which relieves, if believed, B. from proving the fact of intent; and it makes no matter whether the admission by A. in this respect was intentional or unintentional. A.’s admission, so proved, is neither “hearsay,” nor “unoriginal,” nor “second-hand.” Its reception cannot be used as a precedent for the reception of a repetition by B. of what D., an extra-judicial witness, said.

¹ Rat. Jud. Ev. III. 438, 455.

² *Infra*, § 1075.

2. *The abuses likely to arise from a non-discrimination by juries between primary and secondary.* — “By the general rule of law, nothing that is said by any person can be used as evidence between contending parties, unless it is delivered upon oath in the presence of those parties. . . . Some inconvenience no doubt arises from such rigor. If material witnesses happen to die before the trial, the person whose cause they would have established may fail in the suit. But although all the bishops on the bench should be ready to swear to what they heard those witnesses declare, and add their own implicit belief of the truth of the declarations, the evidence would not be received. Upon this subject, the laws of other countries are quite different; they admit evidence of hearsay without scruple. There is not an appeal from the neighboring kingdom of Scotland, in which you will not find a great deal of hearsay evidence upon every fact brought into dispute. But the different rules which prevail there and with us seem to me to have a reasonable foundation in the different manner in which justice is administered in the two countries. In Scotland and most of the continental states, the judges determine upon the facts in dispute as well as upon the law; and they think there is no danger in their listening to evidence of hearsay, because when they come to consider their judgment on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve. But in England, where the jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds.”¹ Hence it has been held that where the object of evidence is to satisfy the court on matters which are for the court, and not for a jury, hearsay evidence may be heard, even where the court is discharging the function of a jury. Thus in order to show that reasonable search has been made for a lost indenture, a witness may be asked whether he has inquired of persons who were likely to know about it, and what answers were given to his inquiries.²

3. *Such testimony, in its first exhibition, is irresponsible.* — A., a witness not produced on trial, says he saw B. do a particular

¹ Mansfield, C. J., 4 Camp. 414.

² R. v. Braintree, 1 E. & E. 51; Powell's Evidence, 4th ed. 138.

thing. C., a witness produced on trial, says he heard A. say that he saw B. do this thing. A. is really the witness, yet he is not responsible for what he says. He is not subjected to the probe of a cross-examination. He is not indictable for perjury. No recourse can be had to him to make him, ordinarily, liable either civilly or criminally for his error. Yet the rule, that a party put on trial is entitled to have his case tried on the evidence of responsible witnesses, is essential to the fair determination of the issue in litigation. In many of our constitutions we find one aspect of this rule given in the maxim, that a party accused has a right to meet the witnesses against him face to face. To dispense with these witnesses, and permit their testimony to be given by those who claim to have heard such witnesses speak, would be to evade this important sanction, and to put a party on trial on evidence whose falsity he would be precluded from either detecting or punishing.

§ 173. Hearsay, however, in its legal sense, is not confined to that which is *said*. Men may express themselves by conduct as well as by words; and to repeat what they said by words is no more hearsay than to repeat what they said by conduct. An impostor dresses himself as an officer of the army, and obtains credit on the basis of his being such an officer. If so, his dress and style are as much a declaration on his part as would be the words, "I am an officer of the army." Of the convertibility of acts with words in this relation, we have an interesting illustration in an English ruling in the exchequer chamber, afterwards affirmed in the house of lords.¹ The issue was that of *devisavit vel non*, and it was held that letters written to the testator by different persons since deceased, and who had been well acquainted with the testator, could not be received in evidence on a question of sanity. The letters, it was argued, were not receivable as mere declarations of deceased witnesses, or as independent facts. But, assuming that the letters were connected with any act of the testator relating to them by which intelligence was indicated, as, for example, if he had answered them, they were receivable. Parke, B., said: "The question is whether the contents of these letters are evidence of the fact to be proved upon the issue; that is, the actual existence of

Acts may
be hear-
say.

¹ Wright v. Tatham, 7 A. & E. 313.

the qualities which the testator is in those letters, by implication, stated to possess; and these letters may be considered, in this respect, to be on the same footing as if they had contained a direct positive statement that he was competent. For this purpose they are mere hearsay evidence, statements of the writers, not on oath, of the truth of the matter in question, with the addition, that they have acted upon the statements on the faith of their being true, by thus sending the letters to the testator. That the so acting cannot give a sufficient sanction for the truth of the statement is perfectly plain, for it is clear that if the same statement had been made by parol, or in writing, to a third person, it would have been insufficient. Yet in both cases there has been an acting on the belief of the truth, by making the statement, or writing and sending a letter to a third person; and what difference can it possibly make that this is an acting of the same nature by writing and sending the letter to the testator?" In a later case,¹ which was an action to recover a sum of money paid by the plaintiff for the purchase of an estate, on the ground that he was a lunatic, and therefore incompetent to contract, evidence was received of his conduct before and after the transaction, to show that the lunacy was of such a character as would be apparent to the defendant when dealing with him.² The reasoning here was that the defendant, from certain facts, was bound to make certain inferences; which, as is elsewhere seen, is relevant on the question of *bona fides*.³ But where acts of third parties, not relating to the issue, are not relevant in the sense just mentioned, they must be excluded as hearsay.⁴ Thus, on the question of seaworthiness, it would be inadmissible to prove that a deceased sea-captain, after a thorough examination of the vessel, embarked in it with his family, and that other underwriters had paid on the same policy.⁵

§ 174. Mr. Bentham has observed that to constitute hearsay testimony, it must be separated by the interposition of some appreciable time from its reception from the party from whom it is obtained. A., a witness in

Interpretation is not hearsay.

¹ *Beavan v. McDonnell*, 10 Exch. 184.

² *Powell's Evidence*, 4th ed. 140.

³ *Supra*, § 35; *infra*, § 176.

⁴ *Backhouse v. Jones*, 6 Bing. N. C. 65. *Supra*, § 29; and see *infra*, § 176.

⁵ See *Wright v. Tatham*, 7 A. & L. 387-8.

court, for instance, speaks in so low a tone that what he says has to be repeated to the jury; or a foreigner, when examined, has to be interpreted by an interpreter. In this case the transmission of the witness's evidence is instantaneous, though through the medium of another person, and it is sometimes argued that because such evidence is instantaneous it is not hearsay. But a sounder reason for the distinction is, that in cases of repetition or interpretation, the inaudible or foreign witness is examined in court, and is therefore responsible; whereas the extra-judicial witness, whose utterances are reported by another, is not examined in court, and is therefore not responsible.¹ An illustration of the same principle may be found in the fact that a witness may interpret for himself, without the intervention of an interpreter.² We should remember, also, following the distinction already noticed, that when an interpreter acts, out of court, as an agent for a party, his statements are to be regarded as the statements of the party whom he represents.³ So we may receive in evidence the rendering in the vernacular by a witness of a confession heard by him in a foreign tongue.⁴

§ 175. Hence we may hold the rule to be that the extra-judicial statements of third persons cannot be proved by hearsay, unless such statements were part of the *res gestae*, or made by deceased persons in the course of business, or as admissions against their own interest.⁵ In this sense as hearsay are to be considered the statements of a person not a party to the suit, as to his mo-

Testimony of non-witnesses not ordinarily receivable when reported by another.

¹ See *Swift v. Applebone*, 23 Mich. 252; *People v. Ah Wee*, 48 Cal. 236; *Scheerer v. Harber*, 36 Ind. 536. *Infra*, § 407.

² *Com. v. Kepper*, 114 Mass. 278.

³ "We have an early case upon this point, in *Fabrigaz v. Mostyn*, reported in 20 Howell's State Trials, 123, where an interpreter had been employed to communicate certain proposals and receive the answer of the other party, and the question was, whether the words of the interpreter could be given in evidence by a witness, or whether the interpreter himself ought to be

called, as the witness neither understood the question put to the party nor the answer made by him; and it was held by Gould, J., that the evidence of the witness was clearly admissible. In such case the interpreter is the accredited agent of the party, acting within the scope of his authority in the execution of his agency." *Dewey, J., Camerlin v. Palmer Co.* 10 Allen, 541.

⁴ *People v. Ah Wee*, 48 Cal. 236.

⁵ *Mima Queen v. Hepburn*, 7 Cranch, 290; *Nudd v. Burrows*, 91 U. S. (1 Otto) 426; *Evans v. Het-*

tives, when such statements are no part of the *res gestae*, but are offered for the purpose of proving the motive of the act;¹ the opinion of others as to the wealth and *status* of an individual;² letters from third parties, though non-residents;³ information derived from others as to contemporaneous historical events;⁴ the report of a state fair committee as to the value of a particular invention;⁵ recitals in deeds as against strangers;⁶ evidence of the value of domestic goods based on information from particular persons;⁷ declarations of third parties that they killed the

tick, 3 Wash. C. C. 409; Lanning v. Case, 4 Wash. C. C. 169; Gaines v. Relf, 12 How. 472; Gains v. Hasty, 63 Me. 361; Gordon v. Shurtliff, 8 N. H. 260; Page v. Parker, 40 N. H. 47; Goddard v. Pratt, 16 Pick. 412; Chapin v. Taft, 18 Pick. 379; Howland v. Crocker, 7 Allen, 153; West-son v. Iron Co. 13 Allen, 95; Brown v. Mooers, 6 Gray, 451; Young v. Makepeace, 103 Mass. 50; Robinson v. Litchfield, 112 Mass. 28; Brooks v. Acton, 117 Mass. 204; Treat v. Barber, 7 Conn. 274; School Dist. v. Blakeslee, 13 Conn. 227; Salmon v. Orser, 5 Duer, 511; Luby v. R. R. 17 N. Y. 131; McKinnon v. Bliss, 21 N. Y. 206; Faulkner v. Whitaker, 15 N. J. L. 438; McCormick v. Robb, 24 Penn. St. 44; Eureka Ins. Co. v. Robinson, 56 Penn. St. 256; Lancaster Co. Bk. v. Moore, 78 Penn. St. 407; Atwell v. Miller, 11 Md. 348; Williamson v. Dillon, 1 Har. & G. 444; Rosenstock v. Tormey, 32 Md. 169; McKinney v. McConnel, 1 Bibb, 239; Detroit R. R. v. Van Steinburg, 17 Mich. 99; Atwood v. Cornwall, 28 Mich. 336; Keegan v. Carpenter, 47 Ind. 597; Jones v. Doe, 2 Ill. 276; Aikin v. Hodge, 61 Ill. 436; Pollard v. People, 69 Ill. 148; Morse v. Thor- sell, 78 Ill. 609; Rowland v. Rowland, 2 Ired. L. 61; State v. Haynes, 71 N. C. 79; Berry v. Osborne, 15 Ga. 194; Chastain v. Robinson, 30 Ga. 55; Yarborough v. Moss, 9 Ala. 382;

Scales v. Desha, 16 Ala. 308; Harts- horn v. Williams, 31 Ala. 149; Wells v. Shipp, 1 Miss. 353; Sherwood v. Houston, 41 Miss. 59; Kean v. New- ell, 2 Mo. 9; Howell v. Howell, 37 Mo. 124; Bain v. Clark, 39 Mo. 252; Atwell v. Lynch, 39 Mo. 519; En- twistle v. Feighner, 60 Mo. 214; Flynn v. Ins. Co. 17 La. An. 135; Davis v. State, 37 Tex. 277; Born- heimer v. Baldwin, 42 Cal. 27.

¹ North Stonington v. Stonington, 31 Conn. 412. See supra, § 72.

² Caswell v. Howard, 16 Pick. 567. See Kost v. Bender, 25 Mich. 515.

³ U. S. v. Barker, 4 Wash. C. C. 464; Longenecker v. Hyde, 6 Binn. 1; Rosenstock v. Tormey, 32 Md. 169; Winslow v. Newlan, 45 Ill. 145; Brayley v. Ross, 33 Iowa, 505; Bank of Ky. v. Todd, 1 A. K. Marsh. 157.

⁴ Swinnerton v. Ins. Co. 9 Bosw. 361; Milbank v. Dennistoun, 10 Bosw. 382.

⁵ Gatling v. Newell, 9 Ind. 572.

⁶ Spaulding v. Knight, 116 Mass. 148; Rose v. Taunton, 119 Mass. 99; Hardenburgh v. Lakin, 47 N. Y. 111; Yahoola Co. v. Irby, 40 Ga. 479. See infra, §§ 1034-1042.

⁷ Green v. Caulk, 16 Md. 556; Wolf v. Ins. Co. 20 La. Ann. 583; though see infra, §§ 253, 447-450; Alfonso v. U. S. 2 Story, 421, where invoices of shipments of sugar, in July and August, were received to

deceased;¹ declarations of relatives (living at the trial), as to the mental condition of a person whose sanity is disputed;² opinion of a neighborhood as to such sanity;³ even letters by a deceased person to a party whose sanity is in question, unless connected with evidence showing that he acted upon such letters.⁴ It is no reason for receiving such statements that the person making them is dead⁵ (unless under the limitations which will be hereafter designated), or that he was called as a witness, and

show market value of sugar; and see, also, *Fennerstein's Champagne*, 3 Wall. 145; and *U. S. v. Champagne*, 1 Ben. 341, admitting letters from third parties to prove market prices.

¹ *State v. Duncan*, 6 Ired. L. 236; *Smith v. State*, 9 Ala. 990.

² *Heald v. Thing*, 45 Me. 392.

³ *Lancaster Co. Bk. v. Moore*, 78 Penns. St. 407; qualifying *Rogers v. Walker*, 6 Barr, 375.

⁴ *Wright v. Tatham*, cited *supra*, § 173. See 7 A. & E. 391, per Parke, B.; 4 Bing. N. C. 545, per *Ibid.*; *Ibid.* 531, per Alderson, B.; *Ibid.* 502, 504, per Coleridge, J.; *Ibid.* 525, 526, per Patteson, J. The letters rejected in this case were three: 1st. A letter of gratitude to the testator from a clergyman to whom he had formerly given preferment; 2d. A letter of friendship from a relative, with whom the testator was proved to have corresponded three years afterwards; 3d. A letter advising the testator to direct his attorney to take steps in a transaction with a certain parish. This letter was indorsed by the attorney, who was long since deceased. Three of the judges considered that all the letters were admissible, six thought that the last was. The remaining judges, including Lords Brougham, Lyndhurst, and Cottenham, held that all the letters were alike inadmissible. "Had the testator," adds Mr. Tay-

lor, in commenting on this case, "indorsed these letters himself, or could any direct and positive evidence have been given to show that he had — whether by act, speech, or writing — manifested a knowledge of their contents, it is clear that the letters could not have been rejected, or in any way withdrawn from the consideration of the jury; for although they would then have been admitted solely on the technical ground that they explained and illustrated his conduct, no rule of law could have prevented them from operating with full effect upon the minds of the jury, as showing the unbiased opinions of the writers, and in what manner the testator had been treated by them." 7 A. & E. 325, per *Ld. Denman*; 4 Bing. N. C. 500, per Coleridge, J.; *Ibid.* 530, per Alderson, B.; *Ibid.* 510, per Williams, J.; *Ibid.* 567, per Tindal, C. J.; *Taylor's Ev.* § 513.

In the ecclesiastical courts, where, as there is no jury, the distinction between primary and secondary evidence in this respect is less carefully maintained, such evidence is received. *Morgan v. Boys*, per Sir H. Jenner, cited 7 A. & E. 337; *Handley v. Jones*, cited *Ibid.*; *Waters v. Howlett*, per Sir J. Nicholl, cited 1 A. & E. 8; *Wheeler v. Alderson*, 3 Hagg. Ec. R. 574, 609. See *supra*, § 172.

⁵ *Crump v. Starke*, 23 Ark. 131.

being suddenly taken sick, was unable to attend the trial;¹ or that he is legally incompetent as a witness.²

§ 176. What has been said as to the declarations of third parties applies equally to adjudications between strangers. We shall hereafter have copious illustrations of this principle when we consider the effect of judgments.³

So of public acts as to strangers.

With at least equal force does the rule apply to non-judicial public acts.⁴ “A certificate of naturalization issues from a court of record when there has been the proper proof made of a residence of five years, and that the applicant is of the age of twenty-one years, and is of good moral character. This certificate is, against all the world, a judgment of citizenship, from which may follow the right to vote and hold property. It is conclusive as such; but it cannot, in a distinct proceeding, be introduced as evidence of the residence or age at any particular time or place, or of the good character of the applicant.⁵ The certificate of steamboat inspectors, under the Act of Congress of 1852, is evidence that the vessel was inspected by its proper officer; but it is held that it is not evidence of the facts therein recited, when drawn in question by a stranger, although the officer was required by law to make a return of such facts.⁶ So it has been held, that where a sheriff sells real estate, giving to the purchaser a certificate thereof, although there can lawfully be no sale unless there be a previous judgment, and although the sale is based upon and assumes such judgment, and although the law requires the sheriff to give such certificate, the recital by the sheriff of such judgment furnishes no evidence thereof. It must be proved independently of the certificate.”⁷

Even the fact that the declarations of a person were against his interest does not render them evidence, if he be living and could be called as a witness.⁸ Nor does the fact that hearsay

¹ *Gaither v. Martin*, 3 Md. 146.

⁶ *Erickson v. Smith*, 2 Abb. Ct. of App. (N. Y.) 64; 38 How. Pr. 454.

² *Churchill v. Smith*, 16 Vt. 560; *Nettles v. Harrison*, 2 McCord, 230; *Smith v. State*, 41 Tex. 352 (a case of an infant too young to be sworn).

⁷ *Mutual Benefit Life Ins. Co. v. Tisdale*, 91 U. S. Rep. (1 Otto) 245. *Hunt, J.*, citing *Anderson v. James*, 4 Rob. Sup. Ct. 35.

³ *Infra*, § 760.

⁴ *Infra*, § 923; *supra*, § 173.

⁵ *Campbell v. Gordon*, 6 Cr. 176; *Stark v. Chesapeake Ins. Co.* 7 Cr. 420.

⁸ *Fitch v. Chapman*, 10 Conn. 8; *Gordon v. Bowers*, 16 Penn. St. 226; *Macon R. R. v. Davis*, 21 Ga. 173; *Coble v. McDaniel*, 33 Mo. 363.

evidence is reported by a party to the suit make it evidence, if it be reported merely as hearsay.¹

II. EXCEPTION AS TO WITNESS ON FORMER TRIAL.

§ 177. Certain marked exceptions, however, exist to this rule.

Evidence
of deceased
witness on
former
trial ad-
missible.

Among these the following is the first that may be enumerated. What a deceased witness testified to on a former trial between the same parties may be testified to, and may be proved by, witnesses who heard the testimony of the witness; nor is such oral evidence excluded by the fact that the original testimony was reduced to writing. The admission of such evidence is based on the fact that the party against whom the evidence is offered, having had the power to cross-examine on the former trial, and the parties and issue being the same, the second suit is virtually a continuation of the first.² The general rule is thus given by Mansfield, C. J.: "What a witness, since dead, has sworn upon a trial between the same parties, may be given in evidence, either from the judge's notes, or from notes that have been taken by any other person who will swear to their accuracy; or the former evidence may be proved by any person who will swear from his memory

¹ *Stephens v. Vroman*, 16 N. Y. 381. The minutes of a justice of the peace, of testimony taken at a trial before him, are not admissible (except by stipulation) at the trial of the same cause on appeal in the circuit court, either as evidence of the facts at issue, or to impeach or sustain the credibility of a witness by showing what he testified before the justice. *Zitske v. Goldberg*, 38 Wis. 217.

² *Doncaster v. Day*, 3 Taunt. 262; *Lawrence v. Maule*, 4 Drew, 472; *R. v. Joliffe*, 4 T. R. 290; *Wright v. Tatham*, 1 A. & E. 3; *U. S. v. White*, 5 Cranch C. C. 457; *U. S. v. Maccomb*, 5 McLean, 287; *Phil. R. R. v. Howard*, 13 How. 307; *Watson v. Lisbon*, 14 Me. 201; *State v. Hooker*, 17 Vt. 658; *Mathewson v. Sargeant*, 36 Vt. 142; *Earl v. Tupper*, 45 Vt. 275; *Lane v. Brainerd*, 30 Conn. 565;

Jackson v. Lamson, 15 Johns. R. 539; *Wilbur v. Selden*, 6 Cow. 162; *Osborn v. Bell*, 5 Den. 70; *Hooker v. Jamison*, 2 Watts & S. 438; *Jones v. Wood*, 16 Penn. St. 25; *Bowie v. O'Neale*, 5 Har. & J. 226; *Letcher v. Norton*, 4 Seam. 575; *Cook v. Stout*, 47 Ill. 530; *Hutchings v. Corgan*, 59 Ill. 70; *O'Brian v. Com.* 6 Bush, 563; *Harper v. Burrow*, 6 Ired. L. 30; *Jackson v. Jackson*, 47 Ga. 97; *Clealand v. Huey*, 18 Ala. 343; *State v. Cook*, 23 La. 447; *Jaccard v. Anderson*, 37 Mo. 91; *Coughlin v. Haeussler*, 50 Mo. 126; *Poorman v. Miller*, 44 Cal. 269; *People v. Devine*, 46 Cal. 45. That the deposition of a party may be so used, see *Collins v. Smith*, 78 Penn. St. 423. *Infra*, § 477. And so of the notes of his testimony. *Evans v. Reed*, 78 Penn. St. 415; *Pratt v. Patterson*, 3 Weekly Notes, 161.

to its having been given.”¹ Wherever a judgment in one case would be evidence in the other case, there evidence of a deceased witness in one case may be reproduced in the other case, the witness having been open to cross-examination. Mere formal variations of suit will not work an exclusion.² The successors and assignees of a party stand in the same position as the party himself.³ What a deceased witness swore to at the preliminary hearing before the committing magistrate is evidence at the trial in chief;⁴ what a deceased witness swore to on a criminal trial is evidence on a second trial for the same offence, or an offence substantially the same.⁵ What a deceased witness swore before arbitrators in a civil issue may thus be reproduced on trial of the same case in court;⁶ what a deceased witness swore on a

¹ *Mayor of Doncaster v. Day*, 3 Taunt. 262; *Powell's Evidence*, 4th ed. 217.

“It appears that the depositions could be read during the lifetime of the witnesses, on the authority of the *City of London v. Perkins*, 3 Bro. P. C., ed. Toml. 602, which was a case on appeal from the exchequer to the house of lords. *Knight Brace, V. C.*, in *Blagrove v. Blagrove*, 1 De G. & S. 252, expressed an opinion that when the point was substantially the same, it would be necessary to follow that case; but in the last mentioned case he refused to allow the depositions of witnesses taken in a suit by a tenant for life in remainder under a will, to be used in a suit by a tenant in tail in remainder under the same will, without proof of the death or inability to be examined of such witnesses, although both suits were instituted for the preservation of the settled property. But in a suit by a legatee under a will against the executor the depositions in a previous suit against the same executor by another legatee have been allowed to be read. *Coke v. Fountain*, 1 Vern. 413; cf. *Nevil v. Johnson*, 2 Vern. 447, the second suit being *in pari materia* with

the first.” *Powell's Evidence*, 4th ed. 223.

² *Wright v. Tatham*, 1 A. & E. 3. See *infra*, § 760.

³ *Doe v. Foster*, 1 A. & E. 791. *Infra*, § 760.

⁴ *R. v. Edmonds*, 6 C. & P. 164; *State v. Hooker*, 17 Vt. 658; *Davis v. State*, 17 Vt. 658; though see *contra*, *State v. Campbell*, 1 Rich. (S. C.) 124.

⁵ *Whart. Cr. L.* 7th ed. § 657; *R. v. Jolliffe*, 4 T. R. 290; *R. v. Smith*, R. & R. 339; *R. v. Lee*, 4 F. & F. 63; *R. v. Dilmore*, 6 Cox, 52; *R. v. Williams*, 12 Cox, 101; *U. S. v. Maccomb*, 5 McLean, 287; *U. S. v. White*, 5 Cranch, 457; *U. S. v. Wood*, 3 Wash. C. C. 440; *Brown v. Com.* 73 Penn. St. 321; *Summons v. State*, 5 Oh. St. 325; *Barnett v. People*, 54 Ill. 325; *State v. McO'Brien*, 24 Mo. 402; *O'Brien v. Com.* 6 Bush, 563; *Kendrick v. State*, 10 Humph. 479; *People v. Diaz*, 6 Cal. 248; *State v. Atkins*, 1 Overt, 229; though see *contra*, *Finn v. Com.* 5 Rand. 701; *U. S. v. Sterland*, 3 Quart. L. J. 244; 6 Pitts. L. J. 50; *Brogy v. Com.* 10 Grat. 722.

⁶ *Bailey v. Woods*, 17 N. H. 365; *McAdams v. Stilwell*, 13 Penn. St. 90;

criminal trial may be used on an action for damages for the same offence.¹ It has been even held that on an action for a malicious prosecution it is admissible to prove what a deceased witness swore to in the prosecution claimed to have been malicious.² Where, however, the parties in interest, in two civil suits, are essentially different, though the subject matter is the same, the evidence is not receivable.³ If there is a merely technical variation of parties, this will not exclude the testimony.⁴ It is otherwise, however, if there be a substantial difference between the parties.⁵ Unless the issues on the two suits are substantially the same, the evidence of the witness in the first suit cannot be reproduced.⁶ If the evidence was *coram non judice*, or the witness was not sworn,⁷ or cross-examination was precluded or restricted,⁸ the ground for admissibility falls away. It is not, however, necessary that there should be an actual cross-examination, provided there be liberty to cross-examine.⁹ But though a party has cross-examined the testimony of a witness on a former trial, the testimony of the witness, if deceased, cannot be adduced against him, unless the opposite party be the same as in the former suit, or a successor or representative of the same.¹⁰ As the testimony

Death may
be pre-
sumed
from lapse
of time.

taken in a former trial cannot be read if the witness is obtainable,¹¹ the question arises, what proof is requisite to establish the fact that the witness cannot be obtained. This question is generally presented in the shape of alleged death; and on this topic it is enough to say that death

though see *Jessup v. Cook*, 1 Halst. (N. J.) 434.

¹ *Gavan v. Ellsworth*, 45 Ga. 283.

² *Charlesworth v. Tinker*, 18 Wise. 633.

³ *Norris v. Monen*, 3 Watts, 465.

⁴ *Phil. R. R. v. Howard*, 13 How. 307.

⁵ *Infra*, § 760. See *Melvin v. Whiting*, 7 Pick. 79.

⁶ *Infra*, § 782; *Orr v. Hadley*, 36 N. H. 575; *Melvin v. Whiting*, 7 Pick. 79; *Perine v. Swaim*, 2 Johns. Ch. 475; *Sample v. Coulson*, 9 Watts & S. 62; *McMorie v. Storey*, 4 Dev. & Bat. 189.

⁷ See *R. v. Griswell*, 3 T. R. 721.

⁸ *Fitzgerald v. Fitzgerald*, 3 Sw. & Tr. 397; *Steinkeller v. Newton*, 1 Scott N. R. 148; *S. C.* 9 C. & P. 313; *R. v. Ledbetter*, 3 C. & Kir. 108.

⁹ *Cazenove v. Vaughan*, 1 M. & Sel. 4; *McCombie v. Anton*, 6 M. & Gr. 27.

¹⁰ *Doe v. Derby*, 1 A. & E. 783; *Morgan v. Nicholl*, L. R. 2 C. P. 117; *Atkins v. Humphreys*, 1 M. & Rob. 523.

¹¹ See *Chess v. Chess*, 17 S. & R. 409.

is to be inferred from the circumstances of each particular case, irrespective of any general presumption of law.¹

§ 178. Proof of mere disappearance of the original witness is not by itself enough to admit such testimony if by due diligence the witness's attendance could have been secured,² though it is sufficient to show that the original witness is absent, and a non-resident in the state where the trial is held, being out of the jurisdiction of the court.³ It has even been held enough if the witness, though technically within the jurisdiction, cannot, without extraordinary inconvenience, be brought to the trial.⁴ The testimony of a former witness, corruptly kept from court by the party against whom he is called, it has been held may be in like manner reproduced.⁵

So of witnesses out of jurisdiction or since become incompetent.

¹ See this discussed, *infra*, § 1294. See, also, *Benson v. Olive*, 2 Str. 920.

² *U. S. v. Macomb*, 5 McLean, 287; *State v. Staples*, 47 N. H. 113; *Powell v. Waters*, 17 Johns. R. 176; *Wilbur v. Selden*, 6 Cow. 162; *Crary v. Sprague*, 12 Wend. 41; *Berney v. Mitchell*, 34 N. J. L. 337; *Brogy v. Com.* 10 Grat. 722; *Summons v. State*, 5 Oh. St. 325; *Dupree v. State*, 33 Ala. 380; *Hobson v. Harper*, 2 Blackf. 309; *Bergen v. People*, 17 Ill. 426; *Gerhauser v. Ins. Co.* 7 Nev. 174.

³ *Fry v. Wood*, 1 Atk. 445; *Carpenter v. Groff*, 5 S. & R. 162; *Cavanhovan v. Hart*, 21 Penn. St. 495; *Wright v. Cumsty*, 41 Penn. St. 102; *Dye v. Com.* 3 Bush, 3; *Wilder v. St. Paul*, 12 Minn. 192.

⁴ *Fonsick v. Egar*, 6 Esp. 92; *Ward v. Wells*, 1 Taunt. 461; *Mims v. Sturtevant*, 36 Ala. 636. See *Varicas v. French*, 2 C. & Kir. 1008; *Carruthers v. Graham*, 1 C. & Marsh. 5.

⁵ *Morley's case*, 6 How. St. Tr. 770; *R. v. Seaife*, 2 Den. C. C. 281; 17 Q. B. 238; *R. v. Guttridge*, 9 C. & P. 473; *Williams v. State*, 19 Ga. 402. *Infra*, § 1265.

In *Blaggrave v. Blaggrave*, 1 De Gex & Sm. 252, a person was tenant for

life of certain real and personal estate, and two suits were instituted against him in respect of alleged mismanagement of the property, the one being commenced by the tenant for life in remainder, and referring only to the real estate, the other being commenced by the first tenant in tail, and embracing both the real and the personal estate. Under these circumstances, it was proposed, on the authority of *Nevil v. Johnson*, 2 Vern. 217; *Barton v. Palmes*, Prec. in Ch. 233; *Byrne v. Frere*, 2 Moll. 157, and, particularly, the *City of London v. Perkins*, 3 Br. P. C. 602, to read, as against the defendant in the second suit, the depositions that had been taken against him in the first, without any proof that the witnesses were dead, or otherwise incapable of being examined. Vice-Chancellor Knight Bruce, however, properly held that this course could not be pursued; and his decision would not have deserved any notice had it not been that, while pronouncing his judgment, he appeared to recognize the case of the *City of London v. Perkins* as an authority, to a certain extent, for the doctrine propounded by the plaintiff's counsel. The real facts, so argues

So, the former testimony of a witness who has intermediately become incompetent may be proved on a second trial.¹

Answers to inquiries made on searching for the witness will be rejected as hearsay, if tendered in proof of the fact that the witness is abroad ;² but where the question is simply whether a diligent and unsuccessful search has been made for the witness, the better opinion is, that the answers should be received.³ In order to show that inquiries have been duly made at the house of the witness, his declarations as to where he lived cannot be received,⁴ neither will his statement in the deposition itself that he is about to go abroad, render it unnecessary to prove that he has put his purpose in execution.⁵

Mr. Taylor, in discussing this case (Ev. § 440), were these : The city of London having filed a bill against Messrs. Perkins to recover certain tonnage dues under an alleged custom, claimed to read, in evidence of reputation with respect to the custom, certain depositions which had been taken by them in two former suits for the recovery of the same species of tonnage against two other defendants. The court of exchequer rejected this proof, on the ground that the deaths of the witnesses were not shown by "the depositions taken in the cause ;" and they refused to allow the plaintiffs to prove by *vivâ voce* testimony or by affidavit that the witnesses were in fact dead. The plaintiffs appealed, and prayed, among other things, that the order of the court below should be reversed, and that they might be at liberty to read the depositions ; whereupon the house of lords, without granting or alluding to the last paragraph of the prayer, gave judgment that the order be reversed. See, and compare, 3 Br. P. C. 602, and 24 Lords J. 448, under date 23d Jan. 1734. See, also, Carrington v. Cornock, 2 Sim. 567. It is obvious, therefore, that this case does not decide that depositions can in any event be

read in evidence where the witnesses are themselves capable of being called. Neither can such a doctrine be supported by any of the three other cases cited by the plaintiff's counsel in *Blagrove v. Blagrove*, 1 De G. & Sm. 252. In *Byrne v. Frere*, 2 Moll. 157, it is clear that the witnesses were dead ; and there is nothing whatever to show that they were alive either in *Nevil v. Johnson*, 2 Vern. 447, or in *Barton v. Palmes*, Pree. in Ch. 233. These last two cases were decided at the commencement of the last century by a judge of no very exalted reputation, Sir Nathan Wright, and are, moreover, so wretchedly reported as to be utterly valueless as expositions of the law.

¹ *Jones v. Jones*, 1 Cox Ch. 184 ; *Andrews v. Palmer*, 1 Ves. & B. 22 ; *Reed v. Reed*, 78 Penn. St. 415 ; *Speyerer v. Bennett*, 79 Penn. St. 445 ; *Pratt v. Patterson*, 3 Weekly Notes, 161. See *Gresley on Ev.* 366, citing *Gosse v. Tracey*, 1 P. Wms. 287 ; *Cope v. Parry*, 2 J. & W. 538.

² *Robinson v. Markis*, 2 M. & Rob. 375.

³ *Wyatt v. Bateman*, 7 C. & P. 586. *Anstin v. Rumsey*, 2 C. & Kir. 736.

⁴ *Doe v. Powell*, 7 C. & P. 617.

⁵ *Proctor v. Lainson*, 7 C. & P. 631 ; *Taylor's Ev.* § 443.

§ 179. Sickness, as has been incidentally seen, falls under the same rule. Thus in an old case, where a witness, on his journey to the place of trial, was taken so ill as to be unable to proceed, we find it recorded that his deposition was allowed to be read;¹ and the same liberty would apply to depositions taken in a prior case between the same parties. At the same time it should appear that the sickness is of a character imposing permanent inability, as otherwise, to adopt a criticism of Lord Ellenborough, there would be very sudden indispositions and recoveries.² The rule laid down by Lord Ellenborough, that where a witness is taken ill, the party requiring his testimony should move to *put off the trial*, is less open to objection and abuse.³ It is, of course, in such cases, a conflict of inconveniences; but in criminal trials, where the objection to secondary evidence of this class is peculiarly strong, it has been ruled that the deposition of a woman, who was so near her confinement as to be unable to attend a trial, could not at common law be received.⁴ It is otherwise, however, when from the nature of the illness or other infirmity, no reasonable hope remains that the witness will be able to appear in court on any future occasion.⁵ Mental incapacity, from whatever cause, is a sufficient inducement.⁶ It has been said that if the insanity is temporary,

So of insane or sick witness.

¹ Luttrell v. Reynell, 1 Mod. 281.

² Harrison v. Blades, 3 Camp. 458, per Lord Ellenborough; Jones v. Brewer, 4 Taunt. 47, per Heath, J.

³ Taylor's Ev. § 445, citing Harrison v. Blades, 3 Camp. 458.

⁴ R. v. Savage, 5 C. & P. 143, per Patteson, J.

⁵ R. v. Hogg, 6 C. & P. 176, per Gurney, B.; R. v. Edmunds, Ibid. 165, per Tindal, C. J.; R. v. Wilshaw, C. & Marsh. 145; R. v. Cockburn, Dear. & Bell, 203; 7 Cox, 265, S. C.; Jones v. Jones, 1 Cox Ch. R. 181; Andrews v. Palmer, 1 Ves. & B. 22; Fry v. Wood, 1 Atk. 415; Corbett v. Corbett, Ibid. 335, 336. *Contra*, Doe v. Evans, 3 C. & P. 219, where Vaughan, J., is said to have rejected the depositions of a witness, who was bed-ridden and nearly a century old,

and quite unable to attend the trial. But this case is said to be obviously not law, by Mr. Taylor, Ev. § 445.

⁶ "Though we have no express decision upon the subject, it seems clear upon principle that the deposition or testimony of a witness formerly taken in the same cause can be read in evidence, on showing that he is sick and unable to attend, insane, or in such a state of senility as to have lost his memory of the past, equally as where he is dead or out of the jurisdiction. 1 Greenl. on Ev. § 163, n.; Jack v. Woods, 5 Casey, 375. The evidence that Philip Smyser fell within the category of loss of memory and general mental incapacity from old age was very ample. Nor was it necessary to have him in court for examination. It would have been a painful and im-

the true course is to continue the case until the witness recovers;¹ but the contrary view has been expressed by an English court,² and there are some classes of cases (*e. g.* criminal of high grade) in which such a continuance cannot in law be granted, and others in which the inconveniences would be so great as to amount to an obstruction of justice.

§ 180. The evidence of the original witness may be proved by the notes of counsel, or of the judge, or of a short-hand reporter, sworn to by the reproducing witness; nor is it necessary that the notes should purport to give more than the substance of the language of the original witness.³ In such case the notes are not evidence *per se*; their only value being as means of refreshing the memory of the witness.⁴ But the whole relevant part of the testimony as remembered

proper exposure, and no rule of law requires it. Besides, he would not have understood the meaning of the subpoena, — would not have attended, perhaps, voluntarily, — and an attachment against him for contempt would have been entirely out of the question. It was abundantly proved that at the time the deposition was taken he was in the possession of his memory and reason. It was therefore rightly received." *Sharswood, J., Emig v. Diehl*, 76 Penn. St. 373; *S. P., R. v. Griswell*, 3 T. R. 720.

¹ See *Taylor's Ev.* § 444.

² *R. v. Marshall*, C. & Marsh. 147.

³ *Infra*, § 514; *Tod v. Winchelsea*, 3 C. & P. 387; *Doncaster v. Day*, 3 Taunt. 262; *Jeanes v. Wheedon*, 2 M. & Rob. 486; *R. v. Jolliffe*, 4 T. R. 290; *R. v. Christopher*, 1 Den. C. C. 536; 2 Car. & K. 994; *U. S. v. Maccomb*, 5 McLean, 286; *U. S. v. White*, 5 Cranch C. C. 457; *Emery v. Fowler*, 39 Me. 326; *Lime Bank v. Hewett*, 52 Me. 531; *Young v. Dearborn*, 22 N. H. 372; *Williams v. Willard*, 23 Vt. 369; *Woods v. Keyes*, 14 Allen, 238; *Clark v. Voree*, 15 Wend. 193; *Huff v. Bennett*, 6 N. Y.

337; *Martin v. Cope*, 3 Abb. (N. Y.) App. 182; *Sloan v. Summers*, 20 N. J. L. 16; *Wolf v. Wyeth*, 11 S. & R. 149; *Rhine v. Robinson*, 27 Penn. St. 30; *Philadel. R. R. v. Spearen*, 47 Penn. St. 300; *Brown v. Com.* 73 Penn. St. 321; *Summons v. State*, 5 Oh. St. 325; *Horne v. Williams*, 23 Ind. 37; *Marshall v. Adams*, 11 Ill. 37; *Mineral Point R. R. v. Keep*, 22 Ill. 9; *Rivereau v. St. Ament*, 3 Greene (Iowa), 118; *Burson v. Huntington*, 21 Mich. 415; *Fisher v. Kyle*, 27 Mich. 454; *Jones v. Ward*, 3 Jones L. 24; *Riggins v. Brown*, 12 Ga. 271; *Trammell v. Hemphill*, 27 Ga. 525; *Gildersleeve v. Caraway*, 10 Ala. 260; *Smith v. Steamboat Co.* 1 How. Miss. 479; *Thompson v. Blackwell*, 17 B. Mon. 609; *Thurmond v. Trammell*, 28 Tex. 371; *People v. Murphy*, 45 Cal. 137. For a more stringent rule see *U. S. v. Wood*, 3 Wash. C. C. 440; *Com. v. Richards*, 18 Pick. 434; *Warren v. Nichols*, 6 Cow. 162; *Black v. Woodrow*, 39 Md. 194; *Ephraims v. Murdock*, 7 Blackf. 10.

⁴ *Waters v. Waters*, 35 Md. 531; *Zitske v. Goldberg*, 38 Wise. 217. See fully *infra*, § 514.

must, if required, be given,¹ and the mere notes of the judge, unsworn to, or unproved, cannot be received.² If the judge be alive he must be called as a witness, the notes being then receivable to refresh his memory.³

III. EXCEPTION AS TO DEPOSITIONS IN PERPETUAM MEMORIAM.

§ 181. Proof in perpetual memory (*probatio in perpetuam rei memoriam*) is evidence taken provisionally, under order of a competent court, to be used subsequently in cases where no other mode of producing the same proof is feasible. The Roman law permits evidence to be thus provisionally received, in anticipation of suits which a party is prevented from instituting by no fault of his own; supposing that in such case evidence exists which, if not at once taken, will be lost.⁴ The canon law, taking hold of the conscience, extended this right to all cases in which it was important, in the interests of justice, to register testimony which would otherwise be lost.⁵ As to this form of testimony the following qualifications are observed:

Depositions taken in perpetual memory.

1. Such evidence, to be thus perpetuated, must be ephemeral. Witnesses, whose death might be looked forward to, and whose testimony could not be otherwise reproduced, are taken as the usual illustrations of the rule. But the principle applies equally to all proof equally ephemeral. This principle is acted on by our courts when they direct particular articles (*e. g.* instruments of crime) to be impounded and placed under the custody of the

¹ *Goss v. Quinton*, 3 M. & G. 625; *Nichols*, 6 Met. 261." *Chapman, J.*, *Robinson v. Scotney*, 19 Ves. 584; *Woods v. Keyes*, 14 Allen, 238.

² *Huff v. Bennett*, 4 Sandf. 120; *Smith v. Biggs*, 5 Sim. 391; *Tibbetts v. Flanders*, 18 N. H. 284; *Marsh v. Jones*, 21 Vt. 378; *Com. v. Richards*, 18 Pick. 434; *Wood v. Keyes*, 14 Allen, 236; *Gildersleeve v. Conway*, 10 Ala. 260. *Infra*, §§ 514, 1109.

³ *Grimm v. Hamel*, 2 Hilt. 434. See *Conradi v. Conradi*, L. R. 1 P. & D. 514; *Learmouth, ex parte*, 6 Madd. 113.

⁴ See L. 40. D. ad leg. (ix. 2); Nov. 20, c. 1.

⁵ Cap. 5. x. Ut lite n. cont. ii. 6; C. 34, 41, 43, x. De test. (ii. 20.)

court; and when, on a crime being committed, steps are taken under the direction of a competent magistrate, to have measurements and photographs of the *locus delicti*, and of all indications of guilt on building or soil. The canon law recognizes, in addition, the right of a party who has interests dependent upon a writing in process of decay or obliteration, to have such writing juridically perpetuated by exemplification.¹

2. The proceedings must as far as possible be carried on in conformity with the ordinary laws of evidence. Notice, for instance, should be given to all known parties in interest, and opportunity afforded to them to come in and cross-examine.²

3. The testimony must be deposited in court, to be open for juridical use to the opposite party.

4. Although such testimony can be taken before a suit is validly begun (*e. g.* in cases of contumacious absence making it impossible to serve a writ), yet, by the canon law, if the institution of a suit, when practicable, is wilfully delayed, the testimony will be excluded.³

§ 182. Under the English equity practice, when the testimony of a material witness is likely to be lost by death or departure from the realm, a bill to perpetuate testimony is granted to take the deposition of such witness.⁴ In 1842, this right was extended so as to enable any person, who, under circumstances alleged by him to exist, would be entitled to legal remedies on the happening of any future event, though not before, to file a bill in chancery to perpetuate testimony which might be material in pursuing such remedies. In 1856 the divorce court was authorized to make decrees declaratory of legitimacy in advance of legal process. In suits to perpetuate testimony, whether under these statutes, or in the ordinary equity practice, parties who have an interest in contesting the plaintiff's claim must be cited,⁵ and will be compelled to appear and answer;⁶ and the witness is to be examined according to the practice of courts of law in

¹ Cap. 4, x. ii. 6.

⁵ *Dearborn v. Dearborn*, 10 N. H.

² See Heffer, *Inst.* p. 528.

473. See *Faunce v. Gray*, 21 Pick.

³ See Weiske, *Rechtslexicon*, II. 243.

164; Cap. 5, x. Ut lite (ii. 6).

⁶ *Taylor's Ev.* § 490, citing *Ellice*

⁴ *Gresley's Eq. Ev.* 129; *Smith's v. Rowpell*, 2 New R. 3, 150; *S. C.* Chan. Pr. 765. As to N. Y. statute, see *Fay's Stat.* ii. 8-10.

32 Beav. 299, 308, 318.

reference to witnesses going abroad.¹ Ordinarily the bill must set forth that the facts to which the testimony relates cannot be immediately investigated in a court of law; or if they can, that the sole right of action belongs to an opposing party; or that such other party has interposed obstacles that prevent the institution of an action.²

§ 183. In the United States, the time for recording the depositions so taken is usually limited by statute; and depositions not recorded within the prescribed time are inadmissible.³ It is generally essential to the admission of such depositions that they should have been taken before the commencement of the suit in which they are used;⁴ though it has been said that a deposition *in perpetuum* may be used in suits pending at the time of the caption, in cases where, prior to the trial of such suit, the witness has died.⁵

§ 184. Publication of depositions taken in perpetual memory is refused except in cases of witnesses dead, or incapable of attendance, and in support of a suit or action.⁶

¹ Taylor, § 490.

² *Booker v. Booker*, 20 Ga. 777. See *Com. v. Stone*, Thach. C. C. 604. See *Smith v. Grosjean*, 1 Patt. & H. 109.

³ *Braintree v. Hingham*, 1 Pick. 245; *Com. v. Stone*, Thach. C. C. 604; *Myers v. Anderson*, Wright (Ohio), 513. See *Fay's Stat.* ii. 8-10.

⁴ *Greenfield v. Cushman*, 16 Mass. 393. See, however, under N. Y. statute, *Patons v. Westervelt*, 5 How. Pr. 399; 2 *Wait's Pr.* 675.

⁵ *Dearborn v. Dearborn*, 10 N. H. 473. As to Virginia practice, see *Smith v. Grosjean*, 1 Patt. & H. 109.

⁶ 1 *Smith's Ch. Pr.* 768; Taylor, § 490, citing *Morrison v. Arnold*, 19 Ves. 670; *Atty. Gen. v. Ray*, 2 Hare, 518; *Wequelin v. Wequelin*, 2 Curteis, 263.

"The case of *Vane v. Vane*, which came before the court of appeal on Wednesday, April 5, affords a striking illustration of the difference between the principles on which the

courts now act with regard to evidence and those which prevailed in former times. The plaintiff in the suit, which was commenced in 1872, claimed to be entitled to large estates, upon an allegation that his elder brother, through whom the defendant derived title, was illegitimate, having been born before the marriage of his parents. The elder brother had during his life been treated as legitimate, and had taken possession of the estates accordingly; but the plaintiff alleged that he had, since his brother's death, discovered facts which proved the illegitimacy. From the defendant's answer it appeared that in 1802, a few years after the birth of the plaintiff's elder brother, a suit had been instituted in his name to perpetuate testimony of that which was then alleged to be a fact, viz., that he was born after the marriage of his parents. To that suit the plaintiff in *Vane v. Vane* was not a party; indeed, he was not born till

IV. EXCEPTION AS TO MATTERS OF GENERAL INTEREST AND ANCIENT POSSESSION.

§ 185. In matters of general interest, as to which there is no such controversy existing as to induce the pre-arranging of testimony for a particular case, the declarations of deceased witnesses, as to reputation in ancient times, and ancient documentary evidence, may be received to prove matters of public interest, such as boundaries of counties and towns, and rights of common. Such facts, indeed, could rarely be proved at all if we excluded ancient testimony of this sort. And as to it we may make this observation: it has not been exposed to the test of oath and of cross-examination, but it has been exposed to an equally severe test, contemporaneous criticism from parties, some of them adverse, and in the face of such criticism, it has settled down, with its consequences, in

some years after it was commenced. Some depositions were taken in it, and they remained in the custody of the court. The defendant in *Vane v. Vane* applied for an order that these depositions might be published; the plaintiff resisted the application, on the grounds that it was contrary to the settled practice of the court, as shown by *Coventry v. Coventry* (2 R. & M. 144), to publish the depositions in such a suit except as between the parties to it, and that the depositions could not in any event be admissible as evidence against the plaintiff in *Vane v. Vane* in that suit. Vice-Chancellor Malins, reserving the question of the admissibility of the depositions as evidence, ordered that they should be published immediately after the time for the closing of the evidence in *Vane v. Vane*. The court of appeal (James and Mellish, L. JJ., and Baggallay, J. A.) went still further. They ordered that the depositions and the proceedings in the old suit should at once be open to both the parties to the new suit, and they

extended the time for closing the evidence in the new suit for two months, in order to give both parties ample opportunity for considering the depositions in the old suit. Lord Justice Mellish pointed out that the depositions in question, even though they might be inadmissible as evidence, might be the means of putting the parties on the right track to obtain evidence. And he added, that the views of the courts as to the best method to be adopted for the discovery of truth have entirely changed in recent times. And Lord Justice James based his decision on this ground, that if the depositions in question had been in the possession of one of the parties to the new suit, the other party would have been compelled to make discovery of them. The court, therefore, ought to do that which it would have compelled the parties to do, and in fact the interests of truth and justice required that both parties should see the depositions." *London Solicitors' Journal*, Ap. 8, 1876.

the rank of established facts. Hence, on such public matters as boundaries of counties and of municipalities, rights of common, and public highways, the declarations of deceased ancient persons, and old documents, each originating *ante litem motam*, or before a controversy had arisen for which such testimony could have been concocted, are admissible, when the witnesses had peculiar means of knowing what was the ancient reputation as to the matters of which they speak.¹ So landmarks and marked boundaries, such as would be matters of general observation in a community, may, in this country, be proved by hearsay testimony as to what in old times was believed, whenever such boundaries are coincident with public boundaries, or whenever such boundaries belong to a system in which the community is interested.² The ground for the reception of such testimony is the

¹ Best's Ev. § 497; *R. v. Bedfordshire*, 4 E. & B. 535; *Creese v. Barrett*, 1 C., M. & R. 919; *Butler v. Mountgarret*, 7 Ho. Lo. Cas. 633; *Boardman v. Reed*, 6 Peters, 341; *Ellicott v. Pearl*, 10 Pet. 412; *Shutte v. Thompson*, 15 Wall. 151; *Smith v. Forrest*, 49 N. H. 230; *Morse v. Emery*, 49 N. H. 239; *Wood v. Foster*, 8 Allen, 24; *Hannefin v. Blake*, 102 Mass. 297; *Casey v. Inloes*, 1 Gill, 430; *McCausland v. Fleming*, 63 Penn. St. 38; *Cline v. Catron*, 22 Grat. 378; *Toole v. Peterson*, 9 Ired. L. 180; *Shook v. Pate*, 50 Ala. 91; *Evans v. Hurt*, 34 Tex. 111; *Cox v. State*, 41 Tex. 1.

In *The Duke of Newcastle v. Hundred of Broxtowe*, 4 B. & Ad. 273, the question was, whether Nottingham Castle was within the hundred; and it was held that orders made at the county sessions, between 1654 and 1660, in which the castle was described as being within the hundred, were admissible, as the justices must be presumed to have had sufficient acquaintance with the subject to which their declarations related; and that, although contrary evidence that the castle was excepted from the hundred

was given from Domesday Book and an old charter of Henry VI., the judge was right in telling the jury to act on the evidence of a more modern and continuous reputation. But when the question was as to the rights of the county of the City of Chester, as between that city and the County Palatine of Chester, a decree by a lord treasurer and other persons who were not a competent tribunal, and who had no personal knowledge of the facts except such as they derived from an irregular judicial proceeding, was held inadmissible evidence of reputation. *Rogers v. Wood*, 2 B. & Ad. 245; *Powell's Evidence* (11th ed.), 156.

So the conversations of former tenants of a manor, and of other persons interested in it, have been held good evidence as to the boundaries of the manor. *Doe v. Sleeman*, 9 Q. B. 298.

² *Boardman v. Reed*, 6 Pet. 328; *Conn v. Penn*, Pet. C. C. 496; *Fraser v. Hunter*, 5 Cr. C. C. 470; *Adams v. Stanyan*, 21 N. H. 405; *Wendell v. Abbott*, 45 N. H. 349; *Child v. Kingsbury*, 46 Vt. 47; *Com. v. Heffron*, 102 Mass. 118; *Wooster v.*

supposition that the universality and notoriety of the interests concerned remove the temptation and the ability to misrepresent, which would arise if such evidence were received in matters of merely private and personal concern. Accordingly, it is rejected wherever the point at issue appears to partake more of the nature of a private than of a public interest.¹ Thus Coltman, J., argues: ² “The true line (says Butler, J., in *R. v. Criswell*) for courts to adhere to is, that wherever evidence not on oath has been repeatedly received and sanctioned by judicial determination, it shall be allowed; but beyond that, the rule that no evidence shall be admitted, but what is on oath, shall be observed. . . . Evidence of opinion is admitted in some cases without oath; as for instance where reputation is given in evidence to prove a public right. . . . The principle upon which I conceive the exception to rest is this, that the reputation can hardly exist without the concurrence of many parties interested to investigate the subject; and such concurrence is presumptive evidence of the existence of an ancient right, of which, in most cases, direct proof can no longer be given, and ought not to be expected; a restriction now generally admitted as limiting the exception is this, that the right claimed must be of a public nature affecting a considerable number of persons.”³ To this Alderson, B., adds: “The general interest which belongs to the subject would lead to immediate contradiction from others, unless the statement proved were true; and the public nature of the right excludes the probability of individual bias, and makes the sanction of an oath less necessary.”⁴ To the admissibility of such evidence it is no longer considered an essential prerequisite that there should be proof of the exercise of the right claimed within the memory of living men; though the absence of such proof will affect the value of the evidence received.⁵ Nor, as we have

Butler, 13 Conn. 309; *Ratcliffe v. 116*; *Den v. Herring*, 3 Dev. L. 340; *Cary*, 4 Abb. (N. Y.) App. 4; *Donahue v. Case*, 61 N. Y. 631; *Nieman v. Ward*, 1 Watts & S. 68; *McCausland v. Fleming*, 63 Penn. St. 36; though see *Winter v. U. S. Hemp*, 344; *Redding v. McCubbin*, 1 Har. & M. 368; *Ralston v. Miller*, 3 Rand. (Va.) 44; *Doc v. Roc*, 4 Hawks,

116; *Den v. Herring*, 3 Dev. L. 340; *Smith v. Russell*, 37 Tex. 247. *Intra*, § 188.

¹ Powell's Evidence (4th ed.), 151.

² *Wright v. Doe*, 7 A. & E. 360.

³ *S. C.* in the Exchequer Chamber, 4 Bing. N. C. 528.

⁴ Powell's Evidence (4th ed.), 152.

⁵ *Creese v. Barrett*, 1 C., M. & R.

seen, is it an objection to such evidence that it is hearsay derived from hearsay.¹

§ 186. A fact of interest to a whole community may indubitably be thus established, because the statement of a witness as to the impression of a community is open to correction by calling other witnesses as to such impression. It is otherwise, however, as to statements concerning facts as to which a community would not be likely to be impressed.² Acting on this distinction, the courts have excluded hearsay evidence, that a deceased person planted a tree near the road, and stated at the time of planting it that his object was to show where the boundary of the road was when he was a boy ;³ and when the issue is whether a road be public or private, declarations by old persons since dead, that they have seen repairs done upon it, will not be admissible.⁴ So where the question was whether a turnpike stood within the limits of a town, though evidence of reputation was received to show that the town extended to a certain point, yet declarations by old people, since dead, that formerly houses stood where none any longer remained, were rejected, on the ground that these statements were evidence of a particular fact.⁵ Reputation of a neighborhood as to a particular "poplar corner" has been for the same reason excluded.⁶

Facts only of personal interest cannot be so proved.

19, 930; *Dunraven v. Llewellyn*, 15 Q. B. 791, 809; *R. v. Sutton*, 8 A. & E. 523, n. c; *Curzon v. Lomax*, 5 Esp. 60, per *Ld. Ellenborough*; *Steel v. Prickett*, 2 Stark. R. 466, per *Abbott, C. J.*; *Roe v. Parker*, 5 T. R. 32, per *Grose, J.*; though see *U. S. v. Castro*, 24 How. 346.

¹ *Barracrough v. Johnson*, 8 A. & E. 99, 108; *Taylor's Ev.* § 554. *Supra*, § 49; *infra*, § 227.

² *Moseley v. Davies*, 11 Price, 162, 169-172; *Chatfield v. Fryer*, 1 Price, 253; *Garnons v. Barnard*, 1 Anstr. 298; 3 *Eag. & Y.* 380, *S. C.*; *Wells v. Jesus College*, 7 C. & P. 284; *Deacle v. Hancock*, *McClel.* 85; 13 Price, 226, *S. C.* See, also, *Crease v. Bar-*

rett, 1 C., M. & R. 919, 930; 5 Tyr. 458, 472, *S. C.*

³ *R. v. Bliss*, 7 A. & E. 550.

⁴ *Ibid.* 552.

⁵ *Ireland v. Powell*, per *Chambre, J.*, *Pea. Ev.* 16, cited by *Williams, J.*, in *R. v. Bliss*, 7 A. & E. 555.

⁶ *Shutte v. Thompson*, 15 Wall. 162. In this case *Strong, J.*, said:—

"We pass now to consider the fourth bill of exceptions. The court refused to allow proof of the reputation of the neighborhood as to a poplar corner at the present day, 'unless such reputation was traditionary in its character, having passed down from those who were acquainted with the reputation of the tree from an early day to the present time,' or un-

§ 187. As has been already incidentally noticed, the admission of such testimony is confined to litigation as to public interests. Between public interests and private interests, when the admissibility of hearsay comes up in this relation, it is difficult to draw an exact line of principle; and the distinction may be best illustrated by recurrence to the adjudications. Hearsay has been received in England to establish the custom of manors,¹ the custom of mining in a particular district,² the limits of a town,³ the extent of a parish,⁴ the boundary between counties, parishes, hamlets, or manors,⁵ or even between a *reputed* manor, that is, an estate which from some intervening defect has ceased to be an actual manor, and the freehold of a private individual,⁶ or between *old* and *new* land in a manor;⁷ a claim of tolls on a public

less 'the information as to such reputation of the tree was at an early day.' But the court permitted the defendant to prove that the occupants of the Laidley Survey No. 1, and of the Mason Tract adjoining thereto (the poplar being a corner of each), claimed the poplar as the true corner of their tracts. To this ruling of the court the defendant excepted.

"We do not perceive that any injury could have been sustained by the defendant in consequence of this ruling, even if it was incorrect, certainly none that would justify our sending the case to a new trial. But there was no error. Reputation as to the existence of particular facts not of a public nature is not generally admissible, though where the existence of the facts have been proved *aliunde*, reputation is sometimes received to explain them. 1 Greenl. Ev. § 138. Here, however, the evidence was offered not to explain a fact, but to establish it. We do not propose to discuss this subject at length. It is sufficient to say that the limitations imposed by the court upon the evidence of reputation offered are fully

sustained by authority. 1 Stark. Ev. ch. 3, *passim*." Strong, J., *Shutte v. Thompson*, 15 Wall. 162, 163.

¹ *Doe v. Sisson*, 12 East, 62; *Weeks v. Sparks*, 1 M. & Sel. 679; *Prichard v. Powell*, 10 Q. B. 589, explained in *Ld. Dunraven v. Llewellyn*, 15 Q. B. 812; *Moseley v. Davies*, 11 Price, 162; *White v. Lisle*, 4 Madd. 214, 224, 225; *Short v. Lee*, 4 Jac. & W. 464, 473.

² *Crease v. Barrett*, 1 C., M. & R. 919, 928-930. See *Davies v. Morgan*, 1 C. & J. 587.

³ *Ireland v. Powell*, cited Pea. Ev. 16, per Chambre, J., and recognized by Williams, J., in *R. v. Bliss*, 7 A. & E. 555.

⁴ *R. v. Mytton*, 2 E. & E. 557; *S. C. nom. Mytton v. Thornbury*, 29 L. J., M. C. 109.

⁵ *Nicholls v. Parker*, 14 East, 331, n.; *Briseo v. Lomax*, 8 A. & E. 198; 3 N. & P. 388, *S. C.*; *Evans v. Rees*, 10 A. & E. 151; 2 P. & D. 627, *S. C.*; *Plaxton v. Dare*, 10 B. & C. 17; 5 M. & R. 1, *S. C.*; *Thomas v. Jenkins*, 6 A. & E. 525; 1 N. & P. 588, *S. C.*

⁶ *Doe v. Sleeman*, 9 Q. B. 298.

⁷ *Barnes v. Mawson*, 1 M. & Sel. 81.

road,¹ the fact whether a road was public or private,² a prescriptive liability to repair sea-walls,³ or bridges,⁴ a claim of highway,⁵ a right of ferry,⁶ the fact whether land on a river was a public landing-place or not,⁷ the existence and rights of a parochial chapelry,⁸ the jurisdiction of a court, and the fact whether it was a court of record or not,⁹ the existence of a manor,¹⁰ a prescriptive right of toll on all malt brought by the west country barges to London,¹¹ a right by immemorial custom, claimed by the deputy day meters of London, to measure, shovel, unload, and deliver all oysters brought by boat for sale within the limits of the port of London,¹² a claim by the lord of a manor to all coals lying under a certain district of the manor,¹³ a claim of heriot custom in respect of freehold tenements within a manor, held in fee-simple,¹⁴ a custom of electing churchwardens by a select committee,¹⁵ and a prescriptive right to free warren as appurtenant to an entire manor.¹⁶

§ 188. Proof of reputation, on the other hand, has been rejected in England where the question was, what usage had obtained in electing a schoolmaster to a grammar school,¹⁷ whether the sheriff of the county of Chester, or the corporation of the city of Chester, was bound to execute criminals,¹⁸ whether certain tenants of a manor had *prescriptive* rights of common for cattle levant and couchant,¹⁹ what were the boundaries of a

¹ Brett v. Beales, M. & M. 416, 418, per Ld. Tenterden.

² R. v. Bliss, 7 A. & E. 555, per Williams, J.

³ R. v. Leigh, 10 A. & E. 398, 409, 411.

⁴ R. v. Sutton, 8 A. & E. 516; 3 N. & P. 569, S. C.

⁵ Crease v. Barrett, 1 C., M. & R. 929, per Parke, B.; Reed v. Jackson, 1 East, 355.

⁶ Pim v. Curell, 6 M. & W. 234.

⁷ Drinkwater v. Porter, 7 C. & P. 181, per Coleridge, J.

⁸ Carr v. Mostyn, 5 Ex. R. 69.

⁹ Goodtitle v. Dew, Pea. Add. Cas. 204.

¹⁰ Steel v. Prickett, 2 Stark. R. 466, per Abbott, C. J.; Curzon v. Lomax, 5 Esp. 60, per Ld. Ellenborough.

¹¹ City of London v. Clerke, Carth. 181; D. of Beaufort v. Smith, 4 Ex. R. 450.

¹² Laybourn v. Crisp, 4 M. & W. 320.

¹³ Barnes v. Mawson, 1 M. & Sel. 77, 81. In that case evidence was given of a uniform exercise of the right.

¹⁴ Damerell v. Protheroe, 10 Q. B. 20.

¹⁵ Berry v. Banner, Pea. R. 156.

¹⁶ Ld. Carnarvon v. Villebois, 13 M. & W. 313.

¹⁷ Withnell v. Gartham, 1 Esp. 324, 325, per Ld. Kenyon.

¹⁸ R. v. Antrobus, 2 A. & E. 793-795.

¹⁹ See Ld. Dunraven v. Llewellyn, 15 Q. B. 791, 811, 812, overruling

waste over which many of the tenants of a manor claimed a right of common appendant,¹ whether the lord of a manor had a prescriptive right to all wreck within his manorial boundaries,² whether the plaintiff was exclusive owner of the soil, or had a right of common only,³ whether the land in dispute had been purchased by a former occupier, or was part of an entailed estate of which he had been tenant for life,⁴ what patron formerly had the right of presentation to a living,⁵ whether a *farm* modus existed, and what was its nature,⁶ whether a party had a private right of way over a particular field,⁷ whether the tenants of a particular manor had the right of cutting and selling wood,⁸ and what were the boundaries between two private estates.⁹ Where, however, it was shown by direct testimony, the admission of which was unopposed, that the boundaries of the farm in question were identical with those of a hamlet, evidence of reputation as to the hamlet boundaries was let in for the purpose of proving those of the farm; for though it was objected that evidence should not be thus indirectly admitted in a dispute between private individuals, the court overruled the objection, Mr. Justice Coleridge observing, that "he never heard that a fact was not to be proved in the same manner when subsidiary, as when it was the very matter in issue."¹⁰

Weeks v. Sparke, 1 M. & Sel. 679; Williams v. Morgan, 15 Q. B. 782. See, also, and compare Warrick v. Queen's Coll. Oxford, 40 L. J. 785, 788, per Ld. Hatherley, C.

¹ Ld. Dunraven v. Llewellyn, 15 Q. B. 791.

² Talbot v. Lewis, 1 C., M. & R. 495; 5 Tyr. 1, S. C.

³ Richards v. Bassett, 10 B. & C. 663.

⁴ Doe v. Thomas, 14 East, 323; 2 Smith, L. C. 432, S. C.

⁵ Per Ld. Kenyon, in R. v. Eriswell, 3 T. R. 723, questioning Bp. of Meath v. L. Belfield, 1 Wils. 215.

⁶ Wells v. Jesus College, 7 C. & P. 284, per Alderson, B.; White v. Lisle, 4 Madd. 214, 224, 225; Wright v. Rudd, cited 1 Ph. Ev. 241, per Ld.

Lyndhurst. See, however, Webb v. Petts, Noy, 44; Donnison v. Elsley, 3 Eag. & Y. 1396, n.; and cases cited, 1 Ph. Ev. 241, n. 2; Taylor's Ev. §§ 548-9, from which the above recapitulation is taken.

⁷ *Seemle*, per Dampier, J., in Weeks v. Sparke, 1 M. & Sel. 691; and per Ld. Kenyon, in Reed v. Jackson, 1 East, 357.

⁸ Blackett v. Lowes, 2 M. & Sel. 494, 500, per Ld. Ellenborough.

⁹ Clothier v. Chapman, 14 East, 331, n. We have already seen that a similar distinction prevails as to character, which can be proved by reputation, but not by particular acts. *Supra*, § 56.

¹⁰ Thomas v. Jenkins, 6 A. & E. 525, 529; 1 N. & P. S. C. 588. See, also,

189. It is true, as will be seen by an examination of the

Brisco v. Lomax, 8 A. & E. 198, 213 ; 3 N. & P. 388, S. C. ; Taylor's Ev. § 549.

"Whether evidence of reputation is admissible to prove or disprove a *private prescriptive right* or liability, is involved," continues Mr. Taylor, "in some doubt. See *Prichard v. Powell*, 10 Q. B. 589. In the case of *Morewood v. Wood*, where a prescriptive right of digging stones on the lord's waste was claimed by the defendant, as annexed to his estate, and the lord offered evidence of reputation to prove that no such right existed, the judges of the court of king's bench were equally divided on its admissibility; 14 East, 327, n.; but since in that case it is difficult to see how the public could have been interested in the matter, unless it had been shown, which it was not, that the rights of the commoners were infringed by the defendant's claim, such evidence would probably, at the present day, be rejected. It has, however, been determined by the court of queen's bench, that, on the trial of an indictment against the inhabitants of a county for the non-repair of a public bridge, to which the defendants had pleaded that certain persons named were liable to repair the bridge *ratione tenurae*, evidence of reputation was admissible to support the plea. *R. v. Bedfordshire*, 4 E. & B. 535, overruling *R. v. Wavertree*, 2 M. & Rob. 353, and confirming *R. v. Cotton*, 3 Camp. 444. In this case it was very properly considered that the fixing an individual with, or the relieving him from, such a liability as the one in question, had a necessary tendency to abridge or increase the liability of the whole neighborhood (see *Prichard v. Powell*, 10 Q. B. 599, per Patteson, J. ; *Drinkwater v. Porter*, 7 C. & P. 181, per Coleridge, J.) ;

and, moreover, that the admissibility of evidence of reputation, when tendered to *disprove* a public liability or right, could not be governed by a different principle from that which prevails, when such evidence is offered to *establish* the liability or right."

In *Dunraven v. Llewellyn*, 15 Q. B. 791, in the exchequer chamber, the question was in trespass, as to the property in a plot of ground which lay between the waste of the plaintiff and the estate of the defendant. The plaintiff offered evidence of statements made before any controversy arose, by his deceased tenants, who as such had exercised commonable rights over the waste adjoining the *locus in quo* ; and other statements made by deceased persons, who, although not tenants, were resident in the manor, and well acquainted with it. No evidence was given of an actual enjoyment of the right on the close by the tenants. Parke, B., said: "If the question had been one in which all the inhabitants of the manor, or all the tenants of it, or of a particular district of it, had been interested, reputation from any deceased inhabitant or tenant, or even deceased residents in the manor, would have been admissible, such residents having presumably a knowledge of such local customs; and if there had been a common law right for every tenant of the manor to have common on the wastes of a manor, reputation from any deceased tenant as to the extent of those wastes, and therefore as to any particular land being waste of the manor, would have been admissible. But, although there are some books which state that 'common appendant' is of 'common right;' and that 'common appendant' is the 'common law right

American authorities cited above,¹ that with us we have a series of rulings extending evidence of this class to litigation as to boundaries of private estates. The apparent conflict between the English and American cases, on this point, however, is easily explained, and the two lines of authorities will be found to start from a common principle. In England the boundaries of each estate rest on an insulated title, defined by private deeds, and interesting personally only the possessor and his immediate neighbors. With such boundaries the community would not concern itself, unless in consequence of a litigation which would make the opinions of individuals inadmissible; and as to such boundaries there could be therefore no tradition or reputation entitled to weight. In America, on the other hand, our boundaries go back, in the main, to proprietary or government grants, or to purchases from the Indians; and those grants or purchases were of masses of land in blocks, such blocks being generally marked by two distinguishing features, as to each of which the community would take an interest. In the first place the exterior boundaries of these blocks are lines based on landmarks sometimes shifting, sometimes imperfectly described, the meaning of which tradition and reputation have to be invoked to settle.² In

of every free tenant of the lord's wastes,' . . . it is not to be understood that every tenant of a manor has by the common law such a right; but only that certain tenants have such a right, not by prescription, but as a right by common law incident to the grant. . . . This right, therefore, is not a common right of all tenants, but belongs only to each grantee (before the statute of *Quia emptores*) of arable land by virtue of his individual grant, and is an incident thereto; and is as much a peculiar right of the grantee as one derived by express grant or prescription. . . . We are therefore of opinion that the case is precisely in the same situation as if evidence had been offered that there were many persons, tenants of the manor, who had separate prescriptive rights over the lord's wastes; and reputation is not

admissible in the case of such separate right, each being private, and depending on each separate prescription, unless the proposition can be supported, that, because there are many such rights, the rights have a public character, and the evidence, therefore, becomes admissible.

We think this position cannot be maintained. . . . We are of opinion, therefore, that the evidence of reputation offered in this case was, according to the well established rule in the modern cases, inadmissible, as it is in reality in support of a mere private prescription; and the number of these private rights does not make them to be of a public nature." *Powell's Ev.* 4th ed. 159.

¹ See notes to §§ 185, 186.

² "In April, 1847, the joint commissioners of Massachusetts and Rhode

the second place, the inner lines of these blocks, by virtue of which they were distributed among several proprietors, were generally traced from the same uncertain and fluctuating landmarks, which reputation and tradition were required to explain, and were based on a common system of surveying, so that the peculiarities of one became the peculiarities of all. Hence it is that even in such inner lines, constituting the particular boundaries of private estates, the community took such an interest as made its common opinion of value, as exhibiting, not merely what the parties understood the boundaries to be, but what they really made the boundaries. In such cases, the reputation of the community, as given by ancient persons, competent to speak on the subject, before litigation, is admissible, as relating, in fact, to matters of public interest.¹

§ 190. Reputation, it need scarcely be added, must, in order to be evidence, be traced to a local community. "In a matter in which all are concerned, reputation from any one appears to be receivable; but of course it would be almost worthless, unless it came from persons who

Witnesses
to hearsay
must be
competent.

Island, appointed to ascertain and establish the boundary line between the two states, made an agreement and presented it to their respective legislatures.

"Parties living in Massachusetts, whose rights were affected by this decision, petitioned the legislature against the acceptance of the commissioners' report. Mr. Choate appeared for these remonstrants. A portion of the boundary line was described in the agreement as follows: 'Beginning,' &c., &c., 'thence to an angle on the easterly side of Watuppa Pond, thence across the said pond to the two rocks on the westerly side of said pond, and near thereto, then westerly to the buttonwood-tree in the village of Fall River,' " &c., &c.

In his argument, commenting on the boundary, Mr. Choate thus referred to this part of the description: "A boundary line between two sover-

eign states described by a *couple* of stones near a pond, and a *buttonwood sapling* in a village. The commissioners might as well have defined it as starting from a blue jay, thence to a swarm of bees in hiving time, and thence to five hundred foxes with firebrands tied to their tails." Brown's *Life of Choate*, 298.

When the boundaries between states were so loosely given, we cannot expect to find greater exactness in the boundaries of the blocks of territory which were obtained by proprietary grant, or were taken from the Indians. There is scarcely a case involving questions of this kind in which the landmarks do not require to be supplemented by parol. And on these landmarks, private deeds, as well as public grants, depend.

¹ See *Conn v. Peters*, 1 Pet. C. C. 496; *Boardman v. Reed*, 6 Pet. 328; *Raymond v. Coffey*, 5 Oregon, 132.

were shown to have some means of knowledge, as by living in the neighborhood.”¹

§ 191. In connection with evidence of reputation, which has been just treated, may be considered that of the declarations of deceased persons, familiar with a location, and having no tendency to mislead. Such declarations have been received, when the declarant is deceased, and was at the time of the declarations competent and disinterested, provided, however, they were made while he was pointing out the boundaries to which they relate.² Such declarations are to be subjected to severer scrutiny than are declarations as to the reputation of a neighborhood as to matters of public interest. The latter class of declarations can be corrected by calling other witnesses as to the reputation of a community, which is a common fact open to general observation. The former declarations (*i. e.* those by a deceased declarant as to his particular opinion) cannot be so corrected; and it is proper, therefore, that such declarations should only be received when made coincidently with pointing out boundaries, and by parties either performing business duties at the time, or having no interest to subserve in making the declarations.³

¹ Per Parke, B., *Crease v. Barrett*, 1 C., M. & R. 928; *Powell's Evidence*, 4th ed. 163. See, to same effect, *Dunraven v. Llewellyn*, 15 Q. B. 809; *Warwick v. Queen's Coll.* 40 L. J. Ch. 785; *Evans v. Taylor*, 7 A. & E. 617; though see *Freeman v. Reed*, 4 B. & S. 174; *Smith v. Brounfield*, Law R. 9 Ex. 241.

² *Daggett v. Shaw*, 5 Mete. 223; *Bartlett v. Emerson*, 7 Gray, 174; *Flagg v. Mason*, 8 Gray, 556; *Long v. Colton*, 116 Mass. 414; *Bender v. Pitzer*, 27 Penn. St. 333. See *Cook v. Harris*, 61 N. Y. 448. In *Great Falls Co. v. Worster*, 15 N. H. 412; *Smith v. Forrest*, 49 N. H. 230; and *Scoggin v. Dalrymple*, 7 Jones L. 46, a wider range was permitted.

³ In an action of tort for breaking and entering the plaintiff's close, where it appeared that the plaintiff's

deed mentioned as the corner where the description began, a stake and stones on land of B., and a witness testified that he had a conversation with B., since deceased, on his land, while he owned it, about the corner, it being admitted that B. had never owned the land in controversy, it was held that it was inadmissible to show what statement B. had made in this conversation. *Long v. Colton*, 116 Mass. 414.

“The declarations of deceased persons respecting boundaries,” said Colt, J., “are received as evidence as an exception to the rule which rejects hearsay testimony. In most of the decided cases, it is held that the declaration should appear to have been made in disparagement of title, or against the interest of the party making it; but in *Daggett v. Shaw*, 5

§ 192. It should be remembered that declarations of this class are receivable only in cases where there is an ambiguity to be cleared, as where landmarks, requiring extrinsic evidence for their explanation, are referred to. Hence the declarations of a deceased person, that a particular boundary was laid in a particular way, cannot be received to control deeds or other muniments of title in matters in which no ambiguity appears.¹

Met. 223, it is said that the rule, as practised in this commonwealth, is not so restricted, and that declarations of ancient persons, made while in possession of land owned by them, pointing out their boundaries on the land itself, are admissible as evidence when nothing appears to show that they are interested to misrepresent, and it need not appear affirmatively that the declaration was made in restriction of or against their own rights. And in *Bartlett v. Emerson*, 7 Gray, 174, it is held, that to be admissible, such declarations must have been made by persons now deceased, while in possession of land owned by them, and in the act of pointing out their boundaries, with respect to such boundaries, and when nothing appears to show an interest to deceive or misrepresent. *Ware v. Brookhouse*, 7 Gray, 454; *Flagg v. Mason*, 8 Gray, 556.

"The declarations offered and rejected at the trial do not come within the exception thus defined to the rule by which hearsay is excluded. The decisive objection to their competency is that they do not appear to have been made while in the act of pointing out the boundaries on the declarant's land. This is an element which cannot be disregarded, especially when the question is one of private boundary. The declaration derives its force as evidence from the fact that it accompanies an act which it qualifies or gives character to. The declaration is then a part of the act. Without such accompanying act, the declara-

tion is mere narrative, liable to be misunderstood or misapplied, and open to the objections which prevail against hearsay evidence.

"The declaration rejected does not appear to have been offered for the purpose of establishing a boundary by traditionary evidence or reputation. Such evidence has sometimes been said by American courts to be admissible; and in the cases from New Hampshire, cited by the defendant, it seems to be held that declarations of deceased persons, who, from their situation appear to have the means of knowledge, and who have no interest to misrepresent the facts, are admissible to establish private boundaries, although not made on the land. *Smith v. Forrest*, 49 N. H. 230, 237; *Great Falls Co. v. Worster*, 15 N. H. 412, 437. But by the current of authority and upon the better reason, such evidence is inadmissible for the purpose of proving the boundary of a private estate, where such boundary is not identical with another of a public or quasi public nature. 1 *Greenl. Ev.* § 145; 1 *Phil. Ev.* (N. Y. ed. 1849), 241, 242, *Cowen & Hill's Notes*; *Hall v. Mayo*, 97 Mass. 416." *Colt, J.*, *Long v. Colton*, 116 Mass. 411. See *Coyle v. Cleary*, 116 Mass. 208, where proof was admitted that adjoining owners had erected a stone wall more than twenty years old as a division line. This, however, was an admission by a predecessor in title, and on this ground evidence.

¹ *Ellicott v. Pearl*, 10 Pet. 412;

§ 193. It is scarcely necessary to add that declarations offered to establish matters of general interest are generally inadmissible, if it appear they are made from sympathy with or from interest in any pending or projected suit;¹ though it would be a better expression of the rule to say that inadmissibility is confined to declarations which are made as part of a litigation, and which, from the nature of things, cannot prove the generality of a reputation whose want of generality is shown by the very trial in which they were uttered. The fact that they were uttered in a contest as to generality excludes them, for it shows that the generality they are called to prove is a generality that is contested.² It is plain, however, that a suit, whose existence is thus to exclude declarations, must be a suit in which the generality of the reputation sought to be set up is specifically at issue.³

§ 194. Long possession cannot be proved by living witnesses; and to prove it it is necessary to have recourse to ancient documents relating to such possession. Such documents, however, must be thirty years old, and must be traced to the proper archives or depositaries. No doubt, ancient documents, as well as modern, may be forged. To this, however, so far as concerns the question before us, there are two replies. In the first place, while documents attested by witnesses, since deceased, have been forged, the fact that there is a possibility of such falsification is an objection to credibility, but not to competency. In the second place, by requiring that the document should be taken from the proper depositary, the probability of falsification is greatly diminished. We find this test applied in all investigations in which the authenticity of an alleged ancient document is in dispute. The authenticity of the Eikon Basilike is conditioned upon its possession by custodians to whom it was committed by Charles I.⁴ The authenticity of the Codex Flatoien-

Bartlett v. Emerson, 7 Gray, 174; § 185; and also *infra*, § 213, as to Clements v. Kyles, 13 Grat. 468. See qualifications in respect to pedigree.

Shepherd v. Thompson, 4 N. H. 213; ² See, further, *infra*, § 213.

Dibble v. Rogers, 13 Wend. 536; ³ Freeman v. Phillips, 4 M. & Sel. Medley v. Williams, 7 Gill & J. 61; 497; Gee v. Ward, 7 E. & B. 509.

Moore v. Davis, 4 Heisk. 540. ⁴ See Dr. C. Wordsworth's treatise

¹ See authorities grouped, *supra*, on this topic.

sis, on which rests the Scandinavian claim to a pre-Columbian discovery of America, depends in a large measure upon the assumption that it was found two centuries ago in the archives of the Island of Flatøe.¹ The spuriousness, on the other hand, of Napoleon's alleged exculpatory dispatch of March 30, 1808, to Murat, is inferred from the fact that no record of that dispatch is found in the letter-books or records of the time in which it was afterwards claimed to have been issued.² The same test is as important in juridical as it is in historical inquiry. Is the authenticity of an alleged ancient map or deed disputed? If it can be shown to have been deposited, near the time of its alleged date, in the proper archives, the first condition of its admissibility is secured. It is enough, in such case, to entitle a document to be admitted in evidence, to show that it bears on its face marks of having been executed at least thirty years since, and that it comes from the custodians who would have possessed it if it were genuine.³ Thus checked, recitals in deeds, more than thirty years old, are competent, though neither party claims under such deeds to prove the location of a disputed line.⁴ So, also, ancient deeds and leases are admitted, under similar conditions, as declaratory of the public matters contained in them.⁵ That maps can be so used will be elsewhere seen;⁶ and so are ancient court rolls and other documents.⁷

¹ See *Edinburgh Review* for Oct. 1876, p. 150.

² See *Lanfrey's Hist. Napoleon*, III. 198.

³ See *infra*, §§ 668, 703, 733, 1359; *Best's Ev.* § 499; *Malcomson v. O'Dea*, 10 H. of L. Cas. 614; *Bishop of Meath v. Winchester*, 3 Bing. N. C. 200; *Croughton v. Blake*, 12 M. & W. 205; *R. v. Mytton*, 2 E. & E. 557; *Doe v. Roberts*, 13 M. & W. 520; *Randolph v. Gordon*, 5 Price, 312; *Barr v. Gratz*, 4 Wheat. 213; *Winn v. Patterson*, 9 Pet. 675; *U. S. v. Castro*, 24 How. 346; *Goodwin v. Jack*, 62 Me. 414; *Jackson v. Luquere*, 5 Cow. 221; *Hewlett v. Cock*, 7 Wend. 371; *Crowder v. Hopkins*, 10 Paige, 190; *McCausland v. Fleming*, 63 Penn. St. 38; *Casey v. Imloes*, 1 Gill, 430; *Wil-*

lets v. Mandlebaum, 28 Mich. 521; *Middleton v. Mass.* 2 Nott & McC. 55; *Johnson v. Shaw*, 41 Tex. 428.

⁴ *Sparhawk v. Bullard*, 1 Mete. 95; *Morris v. Callahan*, 105 Mass. 129; *Hathaway v. Evans*, 113 Mass. 264.

⁵ *Curzon v. Lomax*, 5 Esp. 60; *Brett v. Beales*, M. & M. 416; *Plaxton v. Dare*, 10 B. & C. 17; *Anglesey v. Hatherton*, 10 M. & W. 218; *Beaufort v. Smith*, 4 Ex. R. 471.

⁶ See *infra*, § 668.

⁷ *Freeman v. Phillips*, 4 M. & Sel. 486; *Gee v. Ward*, 7 E. & B. 509; *Crease v. Barrett*, 1 C., M. & R. 919; *Evans v. Taylor*, 7 A. & E. 626; *Daniel v. Wilkin*, 7 Ex. R. 429; *McCausland v. Fleming*, 63 Penn. St. 38; *Casey v. Imloes*, 1 Gill, 430. See *Tolman v. Emerson*, 4 Pick. 160, cited *infra*, § 643.

§ 195. What, however, is the proper depository, reception from which gives this sanction to an ancient instrument? On this point we have several English rulings. On the one hand, where an expired lease was produced from the custody of the lessor, and proof was given that he had received it from a former occupier of the demised premises, who had paid for several years the precise rent reserved by it, and who, subsequently to the expiration of the term, had procured it from two strangers who claimed no interest in it, the court held the deed to be admissible, without proof in what manner it had come into the hands of these strangers; because, by the act of giving it up to the occupier, they admitted his right to the possession of it, and were consequently presumed to have held it on his account.¹ So the poor-house of a union has been held not to be an unsuitable depository for the documents of any parish within the union.² An unproved will has been received when taken from the custody of a younger son, a devisee under the will.³ Again, a case stated for counsel's opinion by a deceased bishop, respecting his right of presentation to a living, has been admitted against a subsequent bishop of the same see, on a question touching the same right, though the paper was not found in the public registry of the diocese, but among the private family documents of the descendants of the former bishop.⁴

§ 196. An old book of a collector of tithes, so it has been ruled, may be received when taken from the custody either of the executor, or the successor, of the incumbent, or of the successor of the collector.⁵ So, where a mortgagee in fee brought an action of ejectment, and the defendant's case was, that the mortgagor, his father, had, previously to the mortgage, conveyed the estate to trustees in settlement, reserving to himself only a life interest, the court permitted the son to put in the deed of settlement, it being more than thirty years old, though it was produced from among the papers of his late father, against whom its provisions were intended to operate; and though it was

¹ *Rees v. Walters*, 3 M. & W. 527. *Andrew v. Motley*, 12 C. B. (N. S.) See *Slater v. Hodgson*, 9 Q. B. 727; 526.

Bullen v. Michel, 2 Price, 399; *R. v. Mytton*, 2 E. & E. 557. ⁴ *Meath v. Winchester*, 3 Bing. (N. C.) 183.

² *Slater v. Hodgson*, 9 Q. B. 727.

⁵ *Ibid.*; *Jones v. Waller*, 3 Gwill.

³ *Doe v. Pearce*, 2 M. & Rob. 240; 346.

strongly urged that the trustees or their representatives were the parties entitled to its custody; and the more especially so, as by the deed having been permitted to remain with the settlor, he had been enabled to practise a fraud on the mortgagee.¹

§ 197. Yet, on the other hand, there must be proof that will positively trace the document to a custody which would be proper and natural for it at the time of its inception. If the proof fall short of this, the document cannot be received. Thus, where the grandson of a former rector of a parish, produced a book purporting to have been kept by such rector, but the book was not further traced to the grandfather; it was held that the book was not sufficiently proved.² Terriers which have been found among the papers of a mere landholder in the parish,³ have in like manner been rejected, because the legitimate depository for such documents would be either the registry of the

¹ Doe v. Samples, 8 A. & E. 151; 3 N. & P. 254, S. C. See, also, Bertie v. Beaumont, 2 Price, 307; Ld. Trimlestown v. Kemmis, 9 Cl. & Fin. 774, 775; Taylor's Evidence, § 597.

On this topic the remarks of Tindal, C. J., in the house of lords, in the case of Meath v. Winchester, 131; 3 Bing. N. C. 200-202; 10 Bligh, 462-464, S. C., have been so often cited as to become elementary authority.

"Documents," said this excellent judge, "found in a place in which, and under the care of persons with whom such papers might naturally and reasonably be expected to be found, are precisely in the custody which gives authenticity to documents found within it; for it is *not necessary that they should be found in the best and most proper place of deposit*. If documents continue in such custody, there never would be any question as to their authenticity; but it is when documents are found in other than their proper place of deposit that the investigation commences, whether it was reasonable and natural, under the circumstances in the particular case, to

expect that they should have been in the place where they are actually found; for it is obvious, that, while there can be only one place of deposit strictly and absolutely proper, there may be many and various, that are reasonable and probable, though differing in degree; some being more so, some less; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently genuine to render a document admissible, appears from all the cases." See, also, Doe v. Samples, 8 A. & E. 154, per Patteson, J.; Doe v. Phillips, 8 Q. B. 158.

² Randolph v. Gordon, 5 Price, 312.

³ Atkins v. Hatton, 2 Anstr. 386; 3 Gwill. 1106; 4 Wood's Decees, 410; 2 Eag. & Y. 403, S. C.; Atkins v. Ld. Willoughby De Broke, 4 Wood's Decees, 424.

bishop, the archdeacon, or the church chest.¹ The same reason has led to the rejection of the registers of burials and baptisms required by the Act of 52 G. 3, c. 146, §§ 1, 5, to be kept by the clergyman of the parish either at his own residence or in the church, when such registers have been produced from the house of the parish clerk.² The courts have also, on the same principle, rejected a manuscript found in the Herald's Office, enumerating the possessions of a dissolved monastery;³ a curious manuscript book entitled the "Secretum Abbatis," preserved in the Bodleian Library at Oxford, and containing a grant to an abbey;⁴ an old grant to a priory, brought from the Cottonian MSS. in the British Museum;⁵ and two ancient writings, purporting respectively to be an endowment of a vicarage and an inspeximus of the endowment under the seal of a bishop, both of which had been purchased at a sale as part of a private collection of manuscripts.⁶ In all cases of this class it is for the court to determine, as a preliminary question, whether the document came from the proper quarter.

§ 198. Supposing the depository to be unquestionably suitable, must the custodian be sworn, when the document on its face purports to belong to the party who tenders it in evidence? There are some judicial indications which would favor the negative of this view;⁷ but the better opinion is, that even when the proper custodian of the document is the party offering it, the fact of custody must be proved as any other fact necessary to make out a case.⁸ When there is no proper custodian for a document remaining, then the document may be received from the hands of any person to whom such document may naturally have fallen.⁹ Thus proprietary books, in the State of Maine,

¹ *Armstrong v. Hewett*, 4 Price, 216.

² *Doe v. Fowler*, 14 Q. B. 700.

³ *Lygon v. Strutt*, 2 Anstr. 601.

⁴ *Michell v. Rabbetts*, cited 3 Taunt. 91.

⁵ *Swinerton v. M. of Stafford*, 3 Taunt. 91.

⁶ *Potts v. Durant*, 3 Anstr. 789; 2 Eag. & Y. 432, *S. C.* See, also, illustration of same distinction, *supra*, § 56.

⁷ *R. v. Ryton*, 5 T. R. 259; *R. v. Neverthong*, 2 M. & Sel. 337.

⁸ *Evans v. Rees*, 10 A. & E. 151.

See *Earl v. Lewis*, 4 Esp. 1; *Doe v. Keeling*, 11 Q. B. 884.

⁹ *Monumoi Great Beach v. Rogers*, 1 Mass. 159; *Rust v. Mill Co.* 6 Pick. 165; *Tolman v. Emerson*, 4 Pick. 160; *King v. Little*, 1 Cush. 440.

bearing strong internal proof of genuineness, have been received from the custody of the librarian of the Maine Historical Society, there being no remaining natural custodian.¹

§ 199. Must it be proved, in order to admit such documents, that acts (*e. g.* taking of possession) were coincidently done under them? So it has been zealously maintained;² but to require such preliminary proof is to deny the admissibility of the evidence to which such proof is preliminary. Ancient documents are admitted, if taken from the proper depository, on the assumption that living memory does not go back to the period to which the ancient document relates. If, however, living memory does go back to the period to which the document relates, so far as to be able to prove coincident possession, then the reason for the admission of the document fails; or if, to prove coincident possession, a second ancient document is adduced, the case is no ways helped; since, to sustain the second ancient document, coincident possession would still have to be proved. Hence, it has been properly ruled that the absence of proof of coincident possession goes not to admissibility but to weight.³ So where in order to prove a prescriptive right of fishery as appurtenant to a

Coincident
possession
not
needed.

¹ *Goodwin v. Jack*, 62 Me. 416. In this case, Dickerson, J., said: "The books offered in evidence purporting to be 'Pejepscot Records,' cover a period of more than a hundred years, and contain strong internal evidence of their own verity. There is no evidence to impeach their genuineness, or of the present existence of the proprietary, or of any person authorized to represent it, or having any proprietary interest therein. Previous to the decease of John McKeen, of Brunswick, they were in his possession, he claiming title to certain lands under the 'Pejepscot Proprietors.' At the time of the trial they were in the possession of the librarian of the Maine Historical Society. Time has swept away all who could have testified to the original organization of the association, so

long known as 'Pejepscot Proprietors.' To require such evidence, or even parol testimony in the ordinary way, that the books offered are what they purport to be, would be practically to exclude these records from being used as evidence in any case affecting the title to any land originally derived from those proprietors.

"Under these circumstances, we think that the books offered are to be regarded as proving themselves to be what they purport to be,— 'Pejepscot Records,'—and that they are competent evidence of the doings of the 'Pejepscot Proprietors,' without parol or other evidence of their original organization, or the regularity of their subsequent meetings."

² See fully for cases *infra*, § 733.

³ *Malcomson v. O'Dea*, 10 H. of L. Cas. 614.

manor, ancient licenses to fish in the *locus in quo*, which appeared on the court rolls, and were granted by former lords in consideration of certain rents, were tendered in evidence, Mr. Justice Heath, after argument, held that they were admissible without any proof of the rents having been paid; but he added that, "to give them any *weight*, it must be shown that in latter times payments had been made under licenses of the same kind, or that the lords of the manor had exercised other acts of ownership over the fishery, which had been acquiesced in."¹ So, when it became necessary to show that the land in question had been part of the estate of the lessor's ancestor, Sir William Windham, and when, in order to establish this fact, a document was produced from the muniment room of the property inherited from Sir William, which appeared to be a counterpart of a lease of this land made by him, but it purported to be executed only by the lessee, and no proof was given of actual possession under it; the court of queen's bench, after consulting with some of the other judges, held that this deed was admissible in evidence.² And again, in a case relied on in the argument of that last cited, where the action was brought to try the title to the bed of a river, after proof of a grant from Henry VIII., two counterparts of leases were produced from the duke's muniment room, comprehending the soil in question. No payment by a tenant was proved, nor any modern act of ownership; but Lord Denman admitted the instruments as coming from the right custody, observing that no circumstance in the case threw suspicion upon them, and that "the absence of other kinds of proof was mere matter of observation."³

§ 200. In matters of general interest, it is settled, a verdict or judgment, in all cases in which reputation is evidence, is admissible in subsequent suits to affect even strangers to the original suit, in all cases in which such verdict or judgment went directly to the question of reputation.

¹ Rogers v. Allen, 1 Camp. 309-311. See Malcomson v. O'Dea, 10 H. of L. Cas. 593.

² Doe v. Pulman, 3 Q. B. 622, 626. See, also, Clarkson v. Woodhouse, 5 T. R. 413, n., per Ld. Mansfield; 3 Doug. 189, S. C.; Brett v. Beales, M. & M. 418, per Ld. Ten-

terden; Tisdall v. Parnell, 14 Ir. Law R. N. S. 123; Doe v. Passingham, 2 C. & P. 444, per Burrough, J.; Ranccliffe v. Parkyns, 6 Dow, 202, per Ld. Eldon; McKenire v. Fraser, 9 Ves. 5; Taylor's Ev. § 600, from which the above references are taken.

³ Bedford v. Lopes, cited 3 Q. B. 623.

tion.¹ Even a verdict without judgment is for this purpose admissible;² and a verdict taken in an inferior court, provided the proceedings be regularly and fairly conducted, is as admissible as a verdict taken in a superior court.³ But an award in a suit between strangers has been held inadmissible for the purpose above mentioned;⁴ and so have interlocutory orders in chancery.⁵

V. EXCEPTION AS TO PEDIGREE AND RELATIONSHIP; BIRTH, MARRIAGE, AND DEATH.

§ 201. Pedigree, from the nature of things, is open to proof by hearsay, in respect to all family incidents as to which no living witnesses can be found. If what has been handed down in families cannot be in this way proved, pedigree could not in most cases be proved at all. Nor is such tradition, in its best sense, open to the objections applicable to hearsay. A., called as a witness to pedigree, may indeed say, "B. told me this." But pedigree testimony usually takes another shape. It is not, "B. told this," but, "such was the understanding of the family." The constitution of a family may become a matter of immediate perception. A., B., C., and D. are brought up as brothers in the same household. If any one says to A., "B. is your brother," A. would not regard such an announcement as any more disclosing a fact to him than would the announcement to him that he is a human being. That B. is his brother, is one of the conditions of his family existence. He fits into a family of which B. is a member, in the same way that one stone fits into an arch of which another stone is part. The position of the one presupposes the position of the other.⁶ As to remoter relations the same reasoning applies, though with diminishing force. The recognition of such relations forms part of a family atmosphere; the existence of such relationship con-

Hearsay
admissible
as to pedi-
gree.

¹ *Infra*, §§ 820-23, 827, 828-33;
Reed v. Jackson, 1 East, 355; *Brisco*
v. Lomax, 8 A. & E. 211; *Evans v.*
Rees, 10 A. & E. 256; *Pim v. Curell*,
6 M. & W. 266.

² *Brisco v. Lomax*, 8 A. & E. 198.
See *Carnavon v. Villebois*, 13 M. &
W. 313; *R. v. Bierlow*, 13 Q. B. 933.

³ *Ibid.*

⁴ *Evans v. Rees*, 10 A. & E. 151;
Wenman v. Mackenzie, 5 E. & B.
417.

⁵ *Pim v. Curell*, 6 M. & W. 234,
265.

⁶ See *Mansfield, C. J.*, in 4 *Camp.*
416.

stitutes the family. A family, in this sense, is an object of immediate, instead of mediate perception. To say that "A. is a brother or a cousin, or an uncle or aunt," is not hearsay but primary evidence. But the recognition of pedigree is not limited to such conditions. Even when there is no family *consensus* to be appealed to, what is said by one member of the family to another as to pedigree may be received to prove such pedigree. Hence it is admissible for A. to prove, with the limitations hereafter expressed, what was told him by deceased relatives as to family relations.¹ Nor does the fact that family registers exist exclude proof of declarations of deceased members of the family.² Even *ex parte* affidavits, taken *ante litem motam*, have been received for this purpose.³

§ 202. To the admissibility of declarations when offered as authoritative in pedigree, it is essential that they should be made by lawful relatives. Thus, the declarations of deceased servants and intimate acquaintances are re-

¹ Crease *v.* Barrett, 1 C., M. & R. 928; Vowles *v.* Young, 13 Ves. Jr. 140; Crouch *v.* Hooper, 1 Ex. 255; Hubbard *v.* Lees, L. R. 1 Ex. 255; Crispin *v.* Doglioni, 32 L. J., P. & M. 109; Monkton *v.* Atty. Gen. 2 R. & M. 147; Davis *v.* Wood, 1 Wheat. 6; Banert *v.* Day, 3 Wash. C. C. 243; Chirac *v.* Reinecker, 2 Pet. 621; Elliott *v.* Pearl, 10 Pet. 412; Jewell *v.* Jewell, 17 Pet. 213; 1 How. 219; Blackburn *v.* Crawford, 3 Wall. 175; Secrist *v.* Green, 3 Wall. 744; Gaines *v.* New Orleans, 6 Wall. 642; Dussert *v.* Roe, 1 Wall. Jr. 39; Mooers *v.* Bunker, 29 N. H. 420; Webb *v.* Richardson, 42 Vt. 465; Mason *v.* Fuller, 45 Vt. 29; Chapman *v.* Chapman, 2 Conn. 101; Jackson *v.* Cooley, 8 Johns. R. 128; Jackson *v.* Browner, 18 Johns. R. 37; Douglass *v.* Sanderson, 2 Dall. 116; Winder *v.* Little, 1 Yeates, 152; Watson *v.* Brewster, 1 Penn. St. 381; Shuman *v.* Shuman, 27 Penn. St. 90; Am. Life Ins. Co. *v.* Rosenagle, 77 Penn. St. 507; State *v.* Greenwell, 4 Gill & J. 407; Jones

v. Jones, 36 Md. 447; Cuddy *v.* Brown, 78 Ill. 415; Stockton *v.* Williams, Walk. (Mich.) 120; Morgan *v.* Purnell, 4 Hawks, 95; Cowan *v.* Hite, 2 A. K. Marsh. 238; Speed *v.* Brooks, 7 J. J. Marshall, 119; Saunders *v.* Fuller, 4 Humph. 516; Eaton *v.* Tallmadge, 24 Wise. 217; Anderson *v.* Parker, 6 Cal. 197. See Carnes *v.* Crandall, 10 Iowa, 377.

² Clements *v.* Hunt, 1 Jones L. 400.

³ Hurst *v.* Jones, Wall. Jr. 373.

"Hearsay is good evidence to prove who is my grandfather, when he married, and what children he had, &c., of which it is not reasonable to presume I have better evidence. So, to prove my father, mother, cousin, or other relation beyond the sea dead; and the common reputation and belief of it in the family gives credit to such evidence." Bull. N. P. 294, cited in note, 15 East, 294; Powell's Evidence, 4th ed. 177.

As to the danger of placing too great reliance on this species of evi-

jected,¹ even though coming under the head of dying declarations,² nor are the declarations of illegitimate relations received.³ "The law resorts to hearsay of relations upon the principle of interest in the person from whom the descent is to be made out; and it is not necessary that evidence of consanguinity should have the correctness required as to other facts. If a person says another is his relative or next of kin, it is not necessary to state how the consanguinity exists. It is sufficient that he says A. is his relation, without stating the particular degree, which perhaps he could not tell if asked. But it is evidence, from the interest of the person in knowing the connections of the family; therefore, the opinion of the neighborhood of what passed among the acquaintances will not do."⁴ But the declarations by a deceased husband as to his wife's legitimacy are admissible, as well as those of her blood relations.⁵

§ 203. Admissibility has been held not to extend as far as to statements made by a wife's father.⁶ And a court has refused to admit the declarations of one brother, that a deceased brother had an illegitimate son.⁷ But legitimacy may be so established;⁸ and the declarations of a deceased father, that a son is illegitimate, have been received on the issue of legitimacy.⁹ The better opinion is that a party's declarations, that he is himself illegitimate, are inadmissible, unless it be against himself and his successors as to title acquired subsequently to the declarations.¹⁰

§ 204. It has been also ruled¹¹ that the declaration of a deceased woman, of statements made by her former husband, that his estate would go to J. F., and then to J. F.'s heir, were ad-

dence, see the judgment of Lord Romilly in *Crouch v. Hooper*, 16 Beav. 182; *Powell's Evidence*, 4th ed. 174.

¹ *Johnson v. Lawson*, 9 Moore, 183.

² *Doe v. Ridgway*, 4 B. & Ald. 53.

³ *Doe v. Barton*, 2 M. & R. 28. See *Doe v. Davies*, 10 Q. B. 314; *Powell's Evidence*, 4th ed. 175; and see fully, *infra*, § 216.

⁴ Per Lord Erskine, *Vowles v. Young*, 13 Ves. 147.

⁵ *Ibid.*

⁶ *Shrewsbury Peerage*, 7 H. of L. Cas. 23.

⁷ *Crispin v. Doglioni*, 3 Sw. & Tr. 44. *Infra*, § 216.

⁸ *Gaines v. New Orleans*, 6 Wall. 642. *Infra*, §§ 208-216.

⁹ *Barnum v. Barnum*, 42 Md. 251. See *infra*, § 216.

¹⁰ See, as tending to this conclusion, *R. v. Rishworth*, 2 Q. B. 487; *Dyke v. Williams*, 2 Sw. & Tr. 491; *Hitchins v. Eardley*, L. R., P. & D. 218; *Cooke v. Lloyd*, Pea. Ev. App. xxviii.

¹¹ *Doe v. Randall*, 2 M. & P. 20.

missible to show the relationship of the lessor of the plaintiff to J. F. "Consanguinity, or affinity by blood, therefore," said Best, C. J. "is not necessary, and for this obvious reason, that a party by marriage is more likely to be informed of the state of the family of which he is to become a member, than a relation who is only distantly connected by blood; as by frequent conversations, the former may hear the particulars and characters of branches of the family long since dead. . . . The declarations of deceased persons must be taken with all their imperfections, and if they appear to have been made honestly and fairly, they are receivable. If, however, they are made *post litem motam*, they are not admissible, as the party making them must be presumed to have an interest, and not to have expressed an unprejudiced or unbiased opinion." "There seems," says Parke, B., "to be no limitation in the rule as to blood relations; but with regard to relationship by affinity it is different; it seems to be confined to declarations by a husband as to his wife's relations. It is for the judge to decide, as a question precedent to the admission of the evidence, whether the declarant has been sufficiently proved to have been connected by consanguinity or affinity to the family in question; and it makes no difference that the legitimacy of the declarant happens to be also the only question in issue."¹ But the qualification as to the wife's declarations is, as we will see, abandoned; it being now held that the statement of a wife as to her husband's family, and that of a husband as to his wife's family, stand upon the same footing.²

§ 205. Common reputation, in a family connection, as to who are members of a family, is therefore admissible, when no superior evidence is attainable, or in connection with superior evidence, to prove pedigree, legitimacy, and marriage.³ Such reputation may amount to hearsay

¹ Parke, B., in *Davies v. Lowndes*, 7 Scott N. R. 185. See *Doe v. Davies*, 10 Q. B. 314.

² Per Lord St. Leonards, *Shrewsbury Peerage case*, 7 H. L. Cas. 23; *Powell's Evidence*, 4th ed. 175. *Infra*, § 205.

³ *Doe v. Griffin*, 15 East, 293; *Shedden v. Atty. Gen.* 2 Sw. & Tr. 170; 30 L. J., P. & M. 217; *Stegall v. Stegall*,

2 Brock. 256; *Strickland v. Poole*, 1 Dall. 14; *Elliott v. Peirsol*, 1 Pet. 328; *Waldron v. Tuttle*, 4 N. H. 371; *Jackson v. Cooley*, 8 Johns. R. 128; *Copes v. Pearce*, 7 Gill, 247; *Craufurd v. Blackburn*, 17 Md. 49; *Ewell v. State*, 6 Yerg. 364; *Flowers v. Haralson*, 6 Yerg. 494; *Morgan v. Purnell*, 4 Hawks, 95; *Johnson v. Howard*, 1 Har. & M. 281.

upon hearsay ; it may even be without a traceable authoritative source ; but it is not for this reason to be excluded, unless it should appear to come directly from strangers, whose information would be only secondary.¹ Thus, the declarations of a deceased widow, respecting a statement which her husband had made to her as to who his cousins were,—as also the declaration of a relative, in which he asserts generally that he has *heard* what he states,—have been received. If this were not so, the main object of relaxing the ordinary rules of evidence would be frustrated, since it seldom happens that the declarations of deceased relatives embrace matters within their own personal knowledge.² For this reason, as we have just seen, reputation in a family, proved by the testimony of a surviving member of it, is received.³ But when the fact of marriage is directly in issue (*e. g.* in prosecution for bigamy, or in suits where the immediate issue in the case is whether a marriage took place), proof of general reputation, unsupported by other proof, is inadmissible either to prove or disprove the marriage.⁴ It is otherwise, however, when other inferences come in to aid such proof. Thus, evidence that a person went abroad when a young man, and according to the repute of the family had afterwards died in the West Indies, and that the family had never heard of his being married, is admissible to show that he died unmarried.⁵

§ 206. The same distinction is applied where a suit by a reversioner is brought against a tenant *pur autre vie*, in which case the death of the *cestui que vie* cannot be proved solely by reputation.⁶ Nor can we extend the admissibility of this evidence to determine questions of social or political standing.⁷ And so *status* as to race cannot be established by such proof.⁸

¹ *Slany v. Wade*, 1 Myl. & Cr. 355; *Monkton v. Atty. Gen.* 2 Rus. & M. 165; *Robson v. Atty. Gen.* 10 Cl. & F. 500; *Shedden v. Atty. Gen.* 30 L. J., Pr. & Mat. 217; 2 Sw. & T. 170.

² *Ibid.*; *Doe v. Randall*, 2 M. & P. 20.

³ *Doe v. Griffin*, 15 East, 293, and cases cited *supra* in this section.

⁴ *Shields v. Boucher*, 1 De Gex & S. 40; *Westfield v. Warren*, 3 Halst. 249; *Carrie v. Cumming*, 26 Ga. 690;

Davis v. Orme, 36 Ala. 540; *Henderson v. Cargill*, 31 Miss. 367; *Harman v. Harman*, 16 Ill. 85; *Miner v. State*, 58 Ill. 59. See *supra*, § 84; *infra*, § 224.

⁵ *Doe v. Griffin*, 1 East, 293; *Powell's Evidence*, 4th ed. 177.

⁶ *Figg v. Wedderburne*, 6 Jur. 218.

⁷ See *R. v. Erith*, 8 East, 539.

⁸ *Davis v. Wood*, 1 Wheat. 6; *Davis v. Forrest*, 2 Cr. C. C. 23.

§ 207. Sometimes it is argued that the declarations of deceased members of a family are admissible for this purpose, because we are all interested not only in knowing who are related to us, but in telling truly what we know. The latter assertion, however, may be subject to some qualification. We are interested in telling of creditable, but not of discreditable relations. Even as to the nearest relationships, a person of the highest integrity and truthfulness may seal his lips; while distant relationships, sometimes problematical, approximate, even to the most impartial, in proportion to their respectability. In addition to this, we must remember that such evidence "is from its nature very much exposed to fraud and fabrication; and even assuming the declaration, inscription, &c., correctly reported by the medium of evidence used, many instances have shown how erroneous is the assumption, that all the members of a family, especially in the inferior walks of life, are even tolerably conversant with the particulars of its pedigree."¹ In any view the declaration must not be in the declarant's own interest. Thus a statement by a deceased person, who had been married twice, tending to invalidate his first, and thus establish his second marriage, has been rejected.² But it is no objection that the declarant was *in pari casu* with the party tendering the evidence.³

§ 208. Pedigree, if we are to understand it as coextensive with the facts to prove which evidence of the class before us is admissible, includes not merely the relationships of a family, but the dates of the births, deaths, and marriages of its members, when the object of such evidence is to trace relationship. For this purpose the declarations of deceased relatives are admissible.⁴ *Legitimacy*

¹ Best's Ev. § 498, citing the judgment of the master of the rolls in *Crouch v. Hooper*, 16 Beav. 182; *Webb v. Haycock*, 19 Beav. 342. See *State v. Greenwell*, 4 Gill & J. 407; and, particularly, Cockburn, C. J.'s comments on Lady Tichborne's declarations, in the Tichborne prosecution.

² *Plant v. Taylor*, 7 H. & N. 211.

³ *Monckton v. Att. Gen.* 2 R. &

M. 159; *Powell's Evidence*, 4th ed. 182. *Infra*, § 214.

⁴ See cases cited *supra*, § 202; and see *Herbert v. Tuckel*, T. Raym. 84; *Betty v. Nail*, 6 Ir. Law R. (N. S.) 17; *Roe v. Rawlings*, 7 East, 290; *Shields v. Boucher*, 1 De Gex & S. 51; *Plant v. Taylor*, 7 H. & N. 226; *Kidney v. Cockburn*, 2 Russ. & M. 170; qualifying *S. C.* 2 Russ. & M. 168; *Scott v. Ratcliffe*, 5 Pet. 81; *Secrist v. Green*, 3 Wall.

is necessarily involved in the scope of such declarations.¹ It has been however doubted, whether the *place* of birth can be proved by such declarations.² But the better opinion now is that declarations are admissible to show such place where genealogical questions only are concerned.³ It is conceded, however, in settlement cases, hearsay proof of this class is inadmissible.⁴

744; *Morrill v. Foster*, 33 N. H. 379; *Jackson v. Boncham*, 15 Johns. R. 226; *Alexander v. Chamberlin*, 1 Thomp. & C. 600; *Watson v. Brewster*, 1 Penn. St. 381; *American Life Ins. v. Rose-nagle*, 77 Penn. St. 507; *Du Pont v. Davis*, 30 Wisc. 170; *Clements v. Hunt*, 1 Jones L. 400; *Carter v. Buchanan*, 9 Geo. 539; *Saunders v. Fuller*, 4 Humph. 516; *Primm v. Stewart*, 7 Tex. 178. But see, as limiting the operation of such declarations to the mere fact of relationship, excluding times of birth, *Albertson v. Robeson*, 1 Dall. 9; *Roe v. Neal*, *Dudley* (Ga.), 15.

¹ *Gaines v. New Orl.* 6 Wall. 642; *Barnum v. Barnum*, 42 Md. 251. *Supra*, §§ 202, 203.

² *Wilmington v. Burlington*, 4 Pick. 174; *Hall v. Mayo*, 97 Mass. 416; *Shearer v. Clay*, 1 Litt. (Ky.) 260; *Robinson v. Blakely*, 4 Rich. (S. C.) 586.

³ *Hood v. Beauchamp*, *Hubb. Ev. of Success.* 468; *Shields v. Boucher*, 1 De Gex & S. 50; *Rishton v. Nesbitt*, 2 M. & Rob. 554; *Londonderry v. Andover*, 28 Vt. 416; *Union v. Plainfield*, 39 Conn. 563. See *Adams v. Swansea*, 116 Mass. 591.

⁴ *R. v. Eriswell*, 7 T. R. 707; *R. v. Abergwilly*, 2 East, 63; *R. v. Erith*, 8 East, 539.

The case of *R. v. Erith*, 8 East, 539 (says Mr. Taylor, § 582), has repeatedly been cited as an authority for the proposition, that, even in a strict question of pedigree, hearsay evidence of *locality*—or, in other words, the declarations of deceased persons respect-

ing the *places* where their relatives were born, and where they married, resided, came from, went to, or died—cannot be received; but certainly, as was once pointed out by Vice-Chancellor Knight Bruce (*Shields v. Boucher*, 1 De Gex & Sm. 50, 60), the case decides no such point, since Lord Ellenborough carefully rested his judgment on the fact, that no question whatsoever of relationship was involved in the inquiry. Had, therefore, the evidence tendered in that case been required for any genealogical purpose, it is very possible that the court of king's bench would have arrived at a different conclusion; and, indeed, this may be considered as a highly probable hypothesis, inasmuch as hearsay evidence of locality has on several occasions been admitted to elucidate matters of strict pedigree. Thus, in *Hood v. Lady Beauchamp*, where the question was, whether A. B., an ancestor of the declarant C., was the same person as A. B., a blacksmith, who had resided at X., a declaration by C. that his ancestor was a blacksmith, and that he resided at X., was received in evidence by Vice-Chancellor Shadwell.

In *Shields v. Boucher*, De Gex & Sm. 40, where this question was fully discussed, an issue had been directed out of chancery to ascertain the relationship of certain parties; and on the trial all the questions put in the text, except the last, had been rejected by Wilde, C. J. On a motion for a new trial, K. Bruce, V. C., expressed his opinion that the chief justice was

§ 209. Particular facts, though not, as we have seen, admissible in cases of boundaries, are admissible, from the necessity of the case, to prove pedigree. "In cases of general right, which depend upon immemorial usage, living witnesses can only speak of their own knowledge to what passed in their own time; and to supply the deficiency, the law receives the declarations of persons who are dead. There, however, the witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way, or of common, or the like. A declaration with regard to a particular fact, which would support or negative the right, is inadmissible. In matters of pedigree, it being impossible to prove by living witnesses the relationships of past generations, the declarations of deceased members of the family are admitted; but here, as the reputation must proceed on *particular facts*, such as marriages, births, and the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded. General rights are naturally talked of in the neighborhood; and the family transactions among the relations of the parties. Therefore, what is thus dropped in conversation upon such subjects may be presumed to be true."¹

§ 210. Solemn written declarations, when not self-serving, wrong in rejecting the evidence, but it ultimately became unnecessary to decide the point.

In this case, Vice-Chancellor Knight Bruce, in a very elaborate judgment, intimated a strong opinion, that, in a controversy merely genealogical, declarations made by a deceased person as to where he or his family came from, "of what place" his father was designated, and what occupation his father followed, would be admissible, and might be most material evidence for the purpose of identifying and individualizing the person and family under discussion. Again, if it be necessary to show that a family had relations who lived at a particular place, declarations by a deceased member of the family, that "he was going to visit his relatives at that place,"

will be evidence; not, indeed, that he went there, or that any person of his name lived in that neighborhood; but as proving a tradition in the family, that they once had relations living in the place in question, which tradition, in the event of its being shown by other evidence that persons of the same name had resided there, might be important as a mode of identifying those persons with the branch of the family alluded to. *Rishton v. Nesbitt*, 2 M. & Rob. 554, per Rolfe, B. So, evidence has been received of a family tradition, that a particular individual died in India, for the purpose of connecting that individual with the family of the claimant. *Ibid.* 556, citing *Monk v. Att. Gen.* 2 Russ. & Myl. 147-151.

¹ Mansfield, C. J. 4 Camp. 415.

are admissible for the reasons thus stated. Among such writings we may notice a provision in a will by a deceased person recognizing or ignoring certain persons as his children; ¹ a description in a will; ² an acknowledgment of a deed by certain persons styling themselves heirs at law; ³ a recital in a family settlement; ⁴ recitals of consistent antecedent deeds and wills; ⁵ and generally a recital in a deed executed by a member of the family. ⁶ The letters of deceased members of the family are also admissible for the same purpose; ⁷ and so of answers in chancery, *ante litem motam*;

Writings
of deceased
relative ad-
missible to
prove pedi-
gree.

¹ Tracy Peer. 10 Cl. & F. 100; Robson v. Atty. Gen. 10 Cl. & F. 498; Hungate v. Gascoigne, 2 Phil. 414; S. C. 2 Coop. 414; De Roos Peer. 2 Coop. 540; Gaines v. New Orleans, 6 Wallace, 642; Shuman v. Shuman, 27 Penn. St. 90; Caujolle v. Ferrie, 23 N. Y. 91; Pearson v. Pearson, 46 Cal. 609; Cowan v. Hite, 2 A. K. Marsh. 238.

² Vulliamy v. Huskisson, 3 Y. & C. Ex. Ch. 82; De Roos Peer. 2 Coop. 540. See Doe v. Pembroke, 11 East, 504.

³ Jackson v. Cooley, 8 Johns. R. 128.

⁴ Neal v. Wilding, 2 Str. 1151; De Roos Peer. 2 Coop. 541.

⁵ Doe v. Phelps, 9 Johns. R. 169; Doe v. Campbell, 10 Ibid. 475; Fuller v. Saxton, 20 N. J. L. 61.

⁶ Hungate v. Gascoigne, 2 Coop. 407; De Roos Peer. 2 Coop. 541; Little v. Palister, 4 Greenl. 209; Paxton v. Price, 1 Yeates, 500; Murphy v. Lloyd, 3 Whart. 538; Bowser v. Cravener, 56 Penn. St. 142; Carter v. Fishing Co. 77 Penn. St. 310; Scharff v. Keener, 64 Penn. St. 376.

"That recitals in ancient deeds are evidence of pedigree, is undoubtedly the law of this state. It was so held in Paxton v. Price, 1 Yeates, 500, and Morris's Lessee v. Vanderen, 1 Dallas, 67. The question arose again in Murphy v. Lloyd, 3 Wharton, 538; and the deed was excluded only on

the ground that the grantor in it was not shown to have had any connection with the land, possession or otherwise, previous to the date of the deed. But Bowser v. Cravener, decided in 1867, 6 P. F. Smith, 132, may be said to run on all-fours with this case, and there the same doctrine was held. In citing Paxton v. Price, supra, it is not intended to assert the principles there decided, as applicable to every case, modern in its circumstances. In that case the deed was but nine years old when it was received in evidence, and the recitals held to be evidence of pedigree. It may be that in matters of very recent occurrence, where the evidence of pedigree is easily attainable, cases may arise where the recitals in such a recent deed would not be entitled to the weight given to them in Paxton v. Price. But the present case is one far removed from the border line of controversy. On the point of execution, Bowser v. Cravener may also be referred to, and to it we may add McReynolds v. Longenberger, 7 P. F. Smith, 13, in which the admissibility of ancient documents in evidence is discussed at length." Agnew, J., Scharff v. Keener, 64 Penn. St. 378.

⁷ Kidney v. Cockburn, 2 Rus. & Myl. 168; Butler v. Mountgarret, 6 Ir. Law Rep. N. S. 77; 7 H. of L. Cas. 633.

but not so of the recitals in bills in chancery.¹ As evidence of peculiar weight in this relation may be noticed entries proved to be made by a deceased parent or near relative as to a family birth, death, or marriage.² That reputation with cohabitation is admissible to prove marriage, is elsewhere distinctively discussed.³

§ 211. Evidence of the conduct of deceased relatives is receivable on such issues; and especially of the manner in which a person has been brought up and treated by his family. "If the father," says Mansfield, C. J., "is proved to have brought up the party as his legitimate son, this is sufficient evidence of legitimacy till impeached; and indeed it amounts to a daily assertion that the son is legitimate."⁴

§ 212. Even supposing we limited declarations to the mere statement of relationship, yet this relationship necessarily involves the facts necessary to its constitution. Legitimacy, for instance, involves the marriage of the parents; succession, the death of the ancestor. For the reason, therefore, that the admissibility of a conclusion of law involves the admissibility of the facts on which it depends, we must hold that declarations of the class before us are receivable to prove the facts by which relationship is constituted. Hence, as we have just seen, it is admissible, in order to prove relationship, to adduce declarations of deceased relatives as to marriages and deaths. Any other family incidents, calculated to fix points of pedigree, will be in like manner admissible. Thus, in an English case, where it was important to settle the seniority of three sons, born at the same birth, it was held admissible to prove the father's declarations, that he named them Stephanas, Fortunatus, and Achaicus, following the order in the seventeenth verse of the sixteenth chapter of St. Paul's First Epistle to the Corinthians, to mark their succession, and to prove also the aunt's declara-

¹ Boileau v. Rutlin, 2 Ex. R. 678.

³ See supra, §§ 84, 205.

² See infra, § 219; Berkeley Peer. 4 Camp. 401, 418; Suss. Peer. 11 Cl. & F. 85; Clara v. Ewell, 2 Cr. C. C. 208; Carkskadden v. Poorman, 10 Watts, 82; Watson v. Brewster, 1 Penn. St. 381; and see infra, § 654.

⁴ Berkeley Peerage case, 4 Camp. 416; cf. Khajah Hidayut Oollah v. Rai Jan Khanum, 3 Moo. Ind. App. 295; Shrewsbury Peerage case, 7 H. L. Cas. 1; Powell's Evidence (4th ed.), 181. And see supra, § 201.

tions, that she tied strings around the arms of the second and third children, for the same purpose.¹

§ 213. In the cases cited above it is sometimes said that such declarations must be *ante litem motam*; and so has it been expressly ruled in the English court of last resort.² Yet, especially in view of the recent statutes admitting parties as witnesses, it is hard to see why the suspicion of concoction, imputable to declarations *post litem motam*, should not be left to the determination of the jury. There are some pedigree cases so old, that if declarations of deceased persons concerning them be received at all, such declarations must be *post litem motam*; nor is it always possible to determine where the suspicion in question begins. A dispute about legitimacy, for instance, often agitates and divides a family as effectively before suit brought as afterwards, and if conflicts of this class should exclude evidence in any case, it should exclude it in all cases. Nor should it be forgotten that even where the declaration is *ante litem motam*, the person who undertakes to recollect and repeat it does so *post litem motam*; and the evidence takes shape, therefore, under the influences which are declared fatal to its reception. The better view is to apply the test *ante litem motam* leniently, even if under the new statutes it still exists, for the reason that while it may shut out much reliable evidence, it does not shut out much that is unreliable; and to increase the scrutiny to which, on the question of credibility, we should subject the declarations of deceased relatives, declarations which in many cases are steeped in family pride, and in few cases are made free from the prejudices of family contention, if not litigation. Hence, where in a case of disputed descent from a lunatic one of the claimants was allowed to give in evidence a deposition, made by a deceased relation of the lunatic before a master in chancery, on an injunction to discover who was entitled by consanguinity to become committee, it was urged that the deposition was inadmissible as being made *post litem motam*; but

Declara-
tion must
have been
*ante litem
motam*.

¹ Vin. Abr. Ev. T. b. 21. See *Cas. 633*. See, also, *Ellicott v. Pearl*, 10 Pet. 412; *Banert v. Day*, 3 Wash. C. C. 243; *Conjolle v. Ferrie*, 26 Barb. 177; *N. C.* 23 N. Y. 91; *Morgan v. Parnell*, 4 Hawks, 95.

² *Butler v. Mountgarret*, 7 H. of L.

the court held that it was not so,¹ but that it could be received for what it was worth, the objection going to credibility. On the other hand, in a petition for a declaration of legitimacy, it was proved that A., the petitioner's grandfather (whose legitimacy was in issue), had claimed some property in the possession of his reputed maternal uncle, but the latter said that he should defend any action which A. might bring, and communicated the circumstances to A.'s maternal uncle, and A. replied by letter that he wished to establish his legitimacy, but took no further proceedings. Sir J. Hannen held that there was proof of the commencement of a controversy, so as to exclude subsequent declarations by any member of the family as to the marriage of A.'s father and mother.²

§ 214. But even though declarations after litigation has begun are inadmissible, they will not be excluded on account of their having been made with the express view of preventing disputes,³ or in direct support of the declarant's title,⁴ or from the declarant being in the same situation, touching the matter in contest with the party relying on the declaration.⁵

§ 215. If the declarant is living, he must be produced; for if within the process of the court, his declarations, like the declarations of persons against their interest, are

¹ *Gee v. Good*, 29 L. T. 123; *S. C.* under name of *Gee v. Ward*, 7 E. & B. 509.

² *Frederick v. Atty. Gen.* 44 L. J., P. & M. 1; L. R. 3 P. & D. 196; 22 W. R. 416; *Powell's Evidence*, 4th ed. 183.

³ *Berkeley Peerage case*, 4 Camp. 401.

⁴ *Doe v. Davies*, 10 Q. B. 325.

⁵ *Monkton v. Att. Gen.* 2 Russ. & M. 160; *Powell's Evidence*, 4th ed. 165. See also, *Shedden v. Atty. Gen.* 2 Sw. & T. 170; *Reilly v. Fitzgerald*, 1 Drury Chan. 120-140, overruling *Walker v. Beauchamp*, 6 C. & P. 552; *Davies v. Lowndes*, 7 Scott N. R. 198; *S. C.* 6 M. & Gr. 517; and see *Butler v. Mountgarret*, 7 H. of L. Cas. 633; *Elliott v. Peirsol*, 1 Pet. 328.

In the *Sussex Peerage case*, where the claimant, Colonel d'Este, was required to prove that his parents, the Duke of Sussex and Lady Augusta Murray, were legally married, declarations contained in the duke's will and affirming most solemnly the fact of marriage, as also statements to the same effect made by his royal highness in conversation, were rejected; it appearing that some years previously to such declarations and statements being made, a suit had been instituted by the crown to annul the prince's marriage, and it not being shown, as in truth it could not be, that that marriage was not the very marriage on which the claimant relied. 11 Cl. & Fin. 85-99.

inadmissible.¹ Yet such declarations, if the declarant be deceased, are not excluded by the fact that living members of the same family could be examined on the same point.² But in a remarkable case in Ireland, where, in order to establish a Scotch marriage, a relative of the supposed husband had been asked at the trial what she had heard on the subject from members of the family, her answer was held by the court of error to have been rightly rejected, on the ground that the question had not been limited to statements made by *deceased* relatives.³

§ 216. It is not, however, every relation who is entitled to be regarded as a proper authority for *ex parte* declarations of this class. Although a more liberal test may be applied when no other evidence is attainable, yet strictly, declarations as to a family, in order to be received, must emanate from deceased persons connected with such family by blood or marriage.⁴ So closely has this line been pursued, that the declaration of an *illegitimate* son, to the effect that a natural brother died without issue, has been rejected,⁵ and so of the declaration of one brother, that another brother had an illegitimate son;⁶ though these cases might be rested on the ground that the facts being so recent, better evidence than declarations could be secured.⁷ But if we carry out the above rule logically, a bastard cannot in any case be a witness as to the pedigree of his putative family, since to suppose him to have a pedigree, supposes him not to be a bastard.⁸

Declarant must be *de jure* related to family.

¹ *Pendrell v. Pendrell*, 2 Str. 924; *Butler v. Mountgarret*, 6 Ir. Law R. N. S. 77; 7 H. of L. Cas. 633; *Stegall v. Stegall*, 2 Brock. 256; *White v. Strother*, 11 Ala. 720.

² *Taylor's Ev.* § 577; 1 Ph. Ev. 212.

³ 6 Ir. Law R. N. S. 77; 7 H. of L. Cas. 633, S. C. in Dom. Proc.

⁴ *Johnson v. Lawson*, 2 Bing. 86; *Gee v. Ward*, 7 E. & B. 509; *Davies v. Lowndes*, 7 Scott N. R. 188; *Shrewsbury Peer*, 7 H. of L. Cas. 23; *Monkton v. Atty. Gen.* 2 Rus. & M. 159; *Mooers v. Buntten*, 29 N. H. 420; *Ellicott v. Pearl*, 10 Pet. 412; *Stein v. Bowman*, 13 Pet. 209; *Jewell v. Jew-*

ell, 17 Pet. 213; 1 How. S. C. 231; *Chapman v. Chapman*, 2 Conn. 347; *Armstrong v. McDonald*, 10 Barb. 300; *Carnes v. Crandall*, 10 Iowa, 377; *State v. Waters*, 3 Ired. L. 455; *Greenwood v. Spiller*, 3 Ill. 502; *Speed v. Brooks*, 7 J. J. Marsh. 119.

⁵ *Doe v. Barton*, 2 M. & Rob. 28.

⁶ *Crispin v. Doglioni*, 3 Sw. & Tr. 44. See *supra*, § 203.

⁷ See *Cooke v. Lloyd*, Pea. Ev. App. xxviii.; *Hitchins v. Eardley*, L. R. 2 P. & D. 248.

⁸ See *Taylor's Ev.* § 573, citing *R. v. Rishworth*, 2 Q. B. 487; *Dyke v. Williams*, 2 Sw. & Tr. 491; *Doe v. Davies*, 10 Q. B. 314. See, however,

§ 217. The declarations of a deceased person who is related to a family by marriage are, as we have seen, admissible to prove the pedigree of the family, including those who compose it; nor does it operate to exclude such declarations that they were made by a husband, as to the family of a deceased wife, unless, it would seem, it should appear that the information detailed was received after the wife's death.¹

§ 218. Before such declarations, however, can be admitted, the relationship of the declarant to the family must be proved by other evidence than his declarations; for it would be a *petitio principii* to say that his declarations are receivable because he is a member of the family, and he is a member of a family because his declarations are receivable.² Such preliminary proof, however, need establish only a *prima facie* case.³

§ 219. For the same purpose may be received an ancient family record or memorial, provided, always, that there is evidence that it has been treated as authoritative by the family, and the parties making the record are dead.⁴ So a family bible or testament proved to be such, and

contra, Jewell v. Jewell, 17 Pet. 213; 1 How. 219, and cases cited supra, § 203.

¹ Vowles v. Young, 13 Ves. 140; Doe v. Harvey, Ry. & M. 297. See, also, cases cited supra, §§ 202, 216.

² R. v. All Saints, 7 B. & C. 789; Davies v. Morgan, 1 C. & J. 591; Atty. Gen. v. Köhler, 9 H. of L. Cas. 660; Dyke v. Williams, 2 Sw. & Tr. 491; Doe v. Randell, 2 M. & P. 24; Blackburn v. Crawford, 3 Wall. 175.

³ Vowles v. Young, 13 Ves. 147; Monkton v. Atty. Gen. 2 Russ. & M. 157.

⁴ Hood v. Beauchamp, 8 Sim. 26; Tracy Peer. 10 Cl. & F. 154; Greenleaf v. R. R. 30 Iowa, 301. *Infra*, § 660.

In the Berkeley Peerage case, 4 Camp. 401, on an issue as to the legitimacy of the petitioner, the three ques-

tions referred by the house of lords to the judges were substantially, —

1. Whether the depositions made by A.'s reputed father, in a suit by A. against B., were evidence of pedigree for A., in a suit by A. against C.

2. Whether, in a similar case, entries made by A.'s reputed father in a bible, that A. was his son, born in wedlock on a certain day, were inadmissible.

3. Whether such entries were inadmissible, if made with the express purpose of establishing A.'s legitimacy, in case it should ever be called in question.

The point in the first question involved the question whether hearsay declarations of pedigree, made after a judicial controversy has arisen, are admissible.

The point in the second question

containing entries of family incidents, will be so received, and this without proof of the handwriting of the entries.¹ A family bible, to prove age, need not be shown to belong to the family, as such. It is enough if it be the property of and recognized as authentic by a member of the family.² Armorial bearings, also,

was whether an entry in a book, made by a deceased relation, is evidence; and in the third, whether such an entry, if otherwise admissible, continues to be so when made with an express purpose of providing against a contemplated or impending controversy.

It was held that the evidence in the first case was inadmissible, as having been made after an actual and not merely a judicial controversy had arisen; that in the second it was strictly admissible, whether the entry was made in a bible or any other book, or on any other piece of paper; and that in the third case it was also admissible, but with strong objections to its credibility, on account of the particularity, and perhaps the professed view with which it was made.

The doctrine in this important case has been followed up by the *Sussex Peerage case*, 11 Cl. & Fin. 85. There an entry made in her prayer-book, by Lady Augusta Murray, of her marriage at Rome to the Duke of Sussex, was received not as conclusive proof, but as a declaration made by one of the parties. In the same case, evidence of declarations by a deceased clergyman that he had celebrated the marriage was rejected. *Powell's Evidence*, 4th ed. 179.

¹ *Hubbard v. Lees*, L. R. 1 Ex. 255; *S. C.* 4 H. & C. 418; *Sussex Peerage case*, 11 Cl. & F. 85; *Monkton v. Atty. Gen.* 2 Rus. & M. 162; *Clara v. Ewell*, 2 Cr. C. C. 209; *Carkskadden v. Poorman*, 10 Watts, 82; *Watson v. Brewster*, 1 Penn. St. 381; *Greenleaf v. R. R.* 30 Iowa, 301; *Southern Life Ins. Co. v. Wilkinson*,

53 Ga. 535; though see *Union v. Plainfield*, 39 Conn. 563.

² *Southern Life Insurance Co. v. Wilkinson*, 53 Ga. 535; but see *Union v. Plainfield*, 39 Conn. 563.

In *Davies v. Lowndes*, 6 M. & G. 525; 7 Scott N. R. 213, where a paper purporting to be an old genealogy having been offered as evidence of pedigree, Lord Denman said: "A pedigree, whether in the shape of a genealogical tree, or map, or contained in a book, or mural or monumental inscription, if recognized by a deceased member of the same family, is admissible, however early the period from which it purports to have been deduced. On what ground is this admitted? It may be because the simple act of recognition of the document, and consequent acknowledgment of the relationship stated in it by a member of the family, is some evidence of that relationship, from whatever sources his information may have been derived, because he was likely, from his situation, both to inquire into the truth of such matters, and, from his means of knowledge, to ascertain it. . . . But the reason why a pedigree, when made or recognized by a member of the family, is admissible, may be that it is presumably made or recognized by him in consequence of his personal knowledge of the individuals therein stated to be relations; or of information received by him from some deceased members, of what the latter knew or heard from other members who lived before his time. And if so, it may well be contended that if

as will be seen,¹ whether carved on wood, painted on glass, engraved on monuments or seals, or otherwise emblazoned, are admissible in cases of pedigree; not only as tending to prove that the person who assumed them was of the family to which they of right belonged, but as illustrating the particular branch from which the descent was claimed, or as showing, by the empalings or quarterings, the nature of the blazonry, or the shape of the shield, what families were allied by marriage, or what members of the family were descended from an illegitimate stock, or were maidens, widows, or heiresses.² When a family record is lost, secondary evidence of its contents is admissible.³

§ 220. With this class of evidence may be mentioned inscriptions on tombstones, and also inscriptions on rings and on portraits, which, if preserved in a family, may be regarded as giving a family tradition, to be received for what it is worth.⁴ Where the original monument cannot be brought into court, then a copy will be permitted.⁵

the facts rebut that presumption, and show that no part of the pedigree was derived from proper sources of information, then the whole of it ought to be rejected; and so, also, if there be some, but an uncertain and undefined, part derived from reference to improper sources. But where the framer speaks of individuals whom he describes as living, we think the reasonable presumption is that he knew them, and spoke of his own personal knowledge, and not from registers, wills, monumental inscriptions, and family records or history; and consequently to that extent the statements in the pedigree are derived from a proper source, and

are good evidence of the relationship of those persons." *Powell's Evidence* 4th ed. 178.

¹ *Infra*, § 22; *Taylor's Ev.* § 592.

² *Harl. MS.* 1836, 6141; *Hervey v. Hervey*, 2 W. Bl. 877; *Chandos Peer. Pr. Min.* 6, 24, 37, 40, 49; *Huntingdon Peer. by Bell*, 280; *Att. Gen.'s Rep.* 359, *S. C.*; *Hastings Peer. Pr. Min.* 313; *Co. Lit.* 27 a; *Shrewsbury Peer.* 7 H. of L. Cas. 10; *Fitzwalter Peer. Pr. Min.* 49; *Camoy's Peer. Pr. Min.* 58; 1 *Sid.* 354.

³ *Holmes v. Marden*, 12 *Pick.* 169; *White v. McLaughlin*, 115 *Mass.* 167.

⁴ *Vowles v. Young*, 13 *Ves.* 144; *Camoy's Peer.* 6 *Cl. & F.* 801; *Davis v. Lowndes*, 7 *Scott, N. R.* 193;

⁵ *Wain v. Bailey*, 10 *A. & E.* 616; *Clay v. Crowe*, 8 *Ex. R.* 298; *Slany v. Wade*, 1 *Myl. & C.* 338; *Tracy Peer.* 10 *Cl. & Fin.* 154; *Jones v. Tarleton*, 9 *M. & W.* 675. *Supra*, § 82.

"In the case of tombstones, no doubt the publicity of the inscription

gives a sort of authenticity to it, and if it remains uncontradicted for a great many years, it would, in the absence of every other fact in the case, be taken to be true; but you cannot put it higher than that." *Bacon, V. C.*, *Haslam v. Crow*, 19 *W. R.* 969; *Powell's Evidence*, 4th ed. 181.

§ 221. We have already seen that charts of pedigree, and armorial bearings, have in like manner been received, when it is proved they have been kept as family records; though they must be regarded as showing rather what the family claimed to be than what it was.¹

So of pedigrees and armorial bearings.

§ 222. But when a pedigree is offered without proof of the loss of the documents of which it is made up, or when on its face it shows that it is made up from vague traditions, uttered long after the events to which they refer, it is inadmissible.²

§ 223. *Death* may be proved by the continuous and abiding general reputation of the community to which the party belongs, as well as by general family belief.³ But to make such reputation or belief admissible it must be general, not limited or special.⁴ Elsewhere is noticed the presumption of death to be drawn from the issue of letters of administration.⁵

Death may be proved by reputation.

§ 224. Reputation in a community, we have already seen,⁶ is, when accompanied by cohabitation, among the facts by which a marriage can be established.

So may marriage.

Perth Peer. 2 H. of L. Cas. 847; Boyle v. Burnett, 9 Gray, 251; North Brookfield v. Warren, 16 Gray, 171; 213; 6 M. & Gr. 527; quoted supra, § 219; State v. Joest, 51 Ind. 287.

Ewell v. State, 6 Yerg. 364; Slaney v. Wade, 1 Myl. & C. 338; De Roos Peer. 2 Cowp. 544. Parke, J. (in Davies v. Lowndes, 6 M. & G. 525; 7 Scott N. R. 193), said: "The ground upon which the inscription on a tombstone or a tablet in a church is admitted is, that it is presumed to have been put there by a member of the family cognizant of the facts, and whose declaration would be evidence; where a pedigree hung up in the family mansion is received, it is on the ground of its recognition by the members of the family."

³ Infra, § 1277; Doe v. Griffin, 1 East, 293; Jackson v. Etz, 5 Cow. 314; Pancoast v. Addison, 1 Har. & J. 350; Raborg v. Hammond, 2 Har. & G. 42; Ringhouse v. Keever, 49 Ill. 470; Scheel v. Eidman, 77 Ill. 301; Buntin v. Duchane, 1 Blackf. Ind. 26; Tisdale v. Ins. Co. 26 Iowa, 170; Anderson v. Parker, 6 Cal. 197; Eaton v. Talmadge, 24 Wise. 217; Ewing v. Savary, 3 Bibb, 235. See Hall, in re, L. R. 4 Eq. 415.

¹ Supra, § 219. Hervey v. Hervey, 2 W. Bl. 877; Shrewsbury Peerage, 7 H. of L. Cas. 10; Hubb. Ev. of Suc. 698. See Banert v. Day, 3 Wash. C. C. 243, where a genealogical table, certified under the seal of a foreign officer, was excluded.

⁴ Morton v. Barrett, 19 Me. 109; Eastman v. Martin, 19 N. H. 152; Morrill v. Foster, 33 N. H. 379; Jackson v. Boncham, 15 Johns. 226; Keech v. Rinehart, 10 Penn. St. 210; Hummel v. Brown, 24 Penn. St. 310. See infra, § 1277.

⁵ Infra, § 1278.

⁶ Supra, §§ 84, 205.

§ 225. In suits for damages to the husband against a third party for adultery with the wife, a peculiar modification is accepted of the rule excluding hearsay. In such cases, where it is material, with the view of increasing or diminishing the damages, to have information as to the relations of the husband and wife before the adultery, it is admissible to put in evidence, not only their conversation with each other, but their conversation with third persons.¹ It is necessary, however, as a prerequisite to the admission of such evidence, that it should be shown by evidence, independent of the date appearing on the face of the letters,² that they were written by the wife to the husband prior to any suspicion of misconduct on her part.³

In adultery correspondence may be proved to show relations of parties.

VII. EXCEPTION AS TO SELF-DISSERVING DECLARATIONS OF DECEASED PERSONS.

§ 226. Another exception to the rule excluding hearsay is to be found in the reception of the declarations of deceased persons made against their interest, although such declarations are offered in suits in which neither such deceased persons, nor those claiming under them, were or are parties.⁴ In the leading case to this effect,⁵ to

Declarations of deceased persons against their interest receivable.

¹ *Trelawney v. Colman*, 2 Stark. R. 191; 1 B. & A. 90, S. C.; *Willis v. Bernard*, 8 Bing. 376; *Winter v. Wroot*, 1 M. & Rob. 404, per Ld. Lyndhurst; *Taylor's Ev.* § 520.

² *Trelawney v. Coleman*, 2 Stark. R. 193, per Holroyd, J.; *Houlston v. Smyth*, 2 C. & P. 24, per Best, C. J. This last case was an action for board and lodging supplied to a wife, while living separate from her husband in consequence of his cruelty; and letters, purporting to be written by the wife, were tendered by the husband to rebut this charge, but were rejected on the ground that no proof was given, beyond their date, of the time when

they were sent. See *Wilton v. Webster*, 7 C. & P. 198.

³ *Edwards v. Crock*, 4 Esp. 39, per Ld. Kenyon; *Trelawney v. Coleman*, 1 B. & A. 90; *Wilton v. Webster*, 7 C. & P. 198, per Coleridge, J. See *Wyndham's Divorce Bill*, 3 Macq. Sc. Ca. H. of L. 54.

⁴ *Higham v. Ridgway*, 10 East, 109; *S. C.* 2 Smith's Lead. Cas. 5th ed. 271; *Middleton v. Melton*, 10 B. & C. 317; *R. v. Birmingham*, 1 B. & S. 768; *R. v. Exeter*, 10 B. & S. 433; *Davies v. Humphreys*, 6 M. & W. 153; *Doe v. Coulthred*, 7 A. & E. 235; *De Bode's case*, 8 Q. B. 208; *Musgrave v. Emmerson*, 10 Q. B. 326; *Short v. Lee*, 2

⁵ *Higham v. Ridgway*, 10 East, 109, *ut supra*; 2 Smith, L. C. 287; cf. *Gleadow v. Atkin*, 1 C. & M. 410.

prove the time of a birth, evidence was given that the man-midwife, who attended the birth, was dead; and the books of the latter, who had kept them regularly, were offered in evidence. They contained an entry, in the handwriting of the deceased, of the circumstances of the birth, and the date. There was also a charge for attendance, against which the word "Paid" was marked. It was held that the entry was evidence of the time of the birth. Lord Ellenborough, C. J., said: "The entry made by the party was to his own immediate prejudice, when he had not only no interest to make it, if it was not true, but he had an interest the other way, not to discharge a claim, which it appears from other evidence that he had." And Bayley, J., added: "All the cases agree, that a written entry by which a man discharges another of a claim which he had against him, or charges himself with a debt to another, is evidence of the fact which he so admits against himself; there being no interest of his own to advance by such entry. . . . The principle to be drawn from all the cases is, that if a person have peculiar means of knowing a fact, and make a declaration of that fact which is against his interest, it is clearly evidence after his death, if he could have been examined to it in his life-time." The same court subsequently¹ received evidence of entries of charges made by a deceased attorney, who had prepared a lease, to show that the lease was executed at a time later than its apparent date; the charges for preparing the lease appearing to have been paid, but not upon the face of the entries. In conformity with these authorities, Lord Penzance has admitted,² as evidence of the execution of a will, an entry made by a deceased solicitor in his ledger admitting payment of his charges for drawing it, and attending its execution.³

Jac. & W. 464; Sussex Peer. case, 11 Cl. & F. 103; Prescott v. Hayes, 43 N. H. 593; Hicks v. Cram, 17 Vt. 449; Litchfield Co. v. Bennett, 7 Cow. 234; White v. Chouteau, 1 E. D. Smith, 493; Livingston v. Arnoux, 56 N. Y. 518, quoted *infra*, § 239; St. Clair v. Shale, 20 Penn. St. 108; Stair v. Bank, 55 Penn. St. 364; Taylor v. Gould, 57 Penn. St. 152; Bird v. Hneston, 10 Oh. St. 418; Blattner v. Weis, 19 Ill. 216; Pease v. Jenkins, 10 Ired. L. 355; Coleman v. Frazier, 4 Rich. 146; Foster v. Brooks, 6 Ga. 287; Ringo v. Richardson, 53 Mo. 385.

¹ Doe v. Robson, 15 East, 32.

² In re Thomas, 41 L. J., P. & M.

32.

³ Powell's Evidence, 4th ed. 195.

§ 227. Such declarations against interest are admissible against third parties, even though the declarant himself received the facts on hearsay, provided the person from whom the hearsay springs was competent to speak.¹ “An entry in an attorney’s bill of a service of notice on A. B. would be evidence of a service, although such notice being generally served by an attorney’s clerk, the attorney probably had no personal knowledge of such service.”² “So if an accoucheur puts down in his book the name of a lady whom he had delivered, and debits himself with the payment, such entry would be evidence of the name, although he may have known nothing of her name except from the information of others.”³ It is essential to prove either directly or circumstantially that the person whose declarations are offered is dead;⁴ though in Virginia the admissibility has been extended to cases where the declarant cannot be compelled to testify.⁵ That the declarant had a competent knowledge of the subject matter of his declaration is necessary in order to entitle his declaration to weight. But a want of knowledge goes not to admissibility but to credibility.⁶

§ 228. It is essential, however, that such declarations, when made, should have been *self-disserving*; *i. e.* that they should have been, when made, against the pecuniary or proprietary interests of the declarant.⁷ Thus in a case argued with conspicuous ability in the house of lords,⁸ dec-

¹ Crease v. Barrett, 1 C., M. & R. 919.

² Percival v. Nanson, 7 Ex. 1, Alderson, B.

³ Pollock, C. B., in *S. C.*; Powell’s Evidence, 4th ed. 200.

⁴ Phillips v. Cole, 10 A. & E. 106; Doe v. Michael, 17 Q. B. 276; Spargo v. Brown, 9 B. & C. 935; Rand v. Dodge, 17 N. H. 343; Coit v. Howd, 1 Gray, 547; Currier v. Gale, 14 Gray, 504; Lowry v. Moss, 1 Strobh. 63.

⁵ Harriman v. Brown, 8 Leigh, 697; *contra*, Stephen v. Gwenap, 1 M. & R. 120.

⁶ Crease v. Barrett, 1 C., M. & R. 925. See *Sussex Peerage case*, 11 Cl. & F. 112.

⁷ *R. v. Worth*, 4 Q. B. 132; *R. v. Birmingham*, 1 B. & S. 768; *Smith v. Blakey*, L. R. 2 Q. B. 326; *S. C.* 8 B. & S. 159; *Orrett v. Corser*, 21 Beav. 52; *Richards v. Gogarty*, 1 R. 4 C. L. 300; *Alleghany Co. v. Nelson*, 25 Penn. St. 332; *Cruger v. Daniel*, 1 McMnl. Eq. 157; *Poorman v. Miller*, 44 Cal. 269.

⁸ *Sussex Peerage case*, 11 C. & F. 85.

larations as to the marriage of Lady Augusta Murray with the Duke of Sussex, made by the deceased clergyman who performed the ceremony, were tendered on the ground that they were declarations of a person who knew the facts, who was not interested in misrepresenting them, and who had an interest in being silent concerning them, because the unlawful celebration of the marriage might have subjected him to a prosecution. But all the judges concurred in holding, that the declaration must be adverse to some pecuniary interest in the declarant; and that even the fear of a prosecution was not a sufficient interest to let in a declaration as contrary to it. Lord Campbell said: "As to the point of interest, I have always understood the rule to be, that the declaration, to be admissible, must have been one which was contrary to the interests of the party making it in a pecuniary point of view. I think it would lead to most inconvenient consequences, both to individuals and the public, if we were to say that the apprehension of a criminal prosecution was an interest which ought to let in such declarations in evidence."¹

§ 229. That an entry which debits the writer with an amount received and then credits him with the same amount paid out, can be regarded as made against his interest, has been denied in England at nisi prius;² but the admissibility of such evidence is sustained by the high authority of Lord Denman and Lord Wensleydale,³ and may be successfully defended on the ground that if there be a suspicion that the whole entry is a fiction (and on this assumption only can admission be refused), this goes to credit and not to admissibility.⁴ If the entry is false, it can be contradicted, as it is only *primâ facie* proof. But as the portion of it which charges the party is admissible, all statements of correlative matters contained in the same writing, or in other writings referred to in such writing, are receivable for what they are worth.⁵

¹ Powell's Evidence, 4th ed. 196. See, to same effect, *Davis v. Lloyd*, 1 C. & K. 276.

² *Doe v. Vowles*, 1 M. & Rob. 261; *Doe v. Burton*, 9 C. & P. 254.

³ *R. v. Hendon*, cited 9 C. & P. 255; *R. v. Lower Heyford*, cited 2 Smith's Lead. Cas. 283.

⁴ See Taylor's Ev. 609 *et seq.*, citing *Higham v. Ridgway*, 10 East, 109; *Doe v. Robson*, 15 East, 32; *Thomas*, in re, 41 L. J., Pr. & Mat. 32.

⁵ *Stead v. Heaton*, 4 T. R. 669; *Davies v. Humphreys*, 6 M. & W. 153; *Marks v. Lahee*, 3 Bing. N. C. 408; *Mayor of Exeter v. Warren*, 5 Q. B.

§ 230. It may be fairly argued that an entry cannot be rejected, which charges the person making it with receiving money from another, on the ground that such entry forms only a part of a general debtor and creditor account, the balance of which is

773 ; *Musgrave v. Emmerson*, 10 Q. B. 326 ; *Rudd v. Wright*, 4 Y. & C. Ex. 294.

To this effect may be cited the remarks of Jessel, M. R., in the English High Court, Chancery Division, June, 1876, *Taylor v. Witham*, 24 W. R. 877. "This question," he said, "is one frequently occurring, and often very important. Under what circumstances can entries made by a dead man be received in evidence? There is no doubt of the established rule: when the entries are against interest, they are receivable, and, when receivable, they may be used for all purposes. Now, what is the meaning of 'against interest?' I agree with Mr. Baron Parke that it means against interest *primâ facie*, and nothing more. If you can show *aliunde* that there was a special reason for making the entry, then the evidence may be worthless, but it is not the less admissible if against interest *primâ facie*. But, it is said, in order to let in the evidence, you must show by independent testimony circumstances proving the entry to be against interest. In the present case, the entries were made by the testator in his ordinary book of accounts, the genuineness of which is not disputed.

"The import of the first entry is *primâ facie* a receipt of money; in its natural purport it is a note in the testator's book that he has received £20. Now, the real value of the entry, in this particular case, is as evidence that there was a debt; but that is a circumstance collateral to the natural meaning of the entry by itself. The use made of it as evidence is im-

material. But, it is said, to make this use of the evidence, you must have something else to show *primâ facie* a debt existing to which the entry may be referred. If that be so, and no one, I think, goes farther than that against the admissibility,—not even Mr. Justice Littledale, in *Doe v. Vowles*, where the evidence which was rejected ought, so far as I can judge, to have been received,—if that is so, we have it proved here, first, that the testator advanced £2,000; secondly, that he received this £20 and other sums. So that there is a good deal of testimony beyond this mere entry. However, I wish to ground my decision upon the point I mentioned first, that the evidence is admissible, or not, according to its *primâ facie* meaning; and if admissible, is so for all purposes. The other entries are as follows [reading the entries]. All these show nothing but payments to the testator, and the natural meaning of them is against his interest. No doubt they can be connected with each other, and with other entries, which makes them important evidence, but taken by themselves they are nothing but entries against interest. In the case of each of these, also, there is other evidence of the debt, so that their admissibility may be justified on that ground also. It follows that all these entries are, in my opinion, evidence. I think, moreover, that they are very important evidence, and it would be much to be regretted if a judge were compelled to reject cogent evidence through some technical rule of law." *S. P., Briggs v. Wilson*, 5 De Gex, M. & G. 12.

in favor of the receiver; ¹ for, if an action were brought against the receiver by his employer, that part of the account which charged the receiver would be evidence against him, while the entries which showed his discharge, though not absolutely inadmissible for him, would, as compared with the entries against his interest, be entitled to very little weight; ² and even if it were otherwise, the admission of the receipt of money would still be against his interest, as the balance in his favor would thereby be diminished to the extent of the sum admitted. ³

§ 231. The fact that the declaration of a deceased person was, taken as a whole, against his interest, does not make evidence all that it incorporates in the way of incidental statements, not in themselves self-disserving. ⁴ We have an illustration of this rule in a case in which the accounts of a deceased steward were tendered in evidence for the purpose of showing that former lords of the manor had been liable to pay poor rates on the tithes. On one side of these accounts the steward acknowledged the receipt of rent for tithes from a tenant; and on the other side was an entry in discharge of the former item, by allowing the tenant a certain sum for poor rates on the tithes. Mr. Baron Alderson, before whom the case was tried, rejected the second entry, on the ground that it was not directly connected with the first item, though made about the same time; but he added that, if the amount charged had been stated to be a sum less by the deduction of the opposite side of the account, it might have been admissible. ⁵

Independent matters cannot be so proved.

§ 232. The fact that better evidence could be had does not exclude such admission. Thus, entries by a deceased person, against interest, have been admitted, although it appeared that persons were living, and not called, who were acquainted with the fact. Hence, entries by a deceased collector, charging himself with the receipt

Such declarations admissible though better evidence could be had.

¹ *Rowe v. Brenton*, 3 M. & R. 267, 268; *Williams v. Geaves*, 8 C. & P. 592, per Patteson, J.; *R. v. Worth*, 4 Q. B. 134, per Coleridge, J.; *Clark v. Wilmot*, 1 Y. & C. Ch. R. 53.

² See 2 Smith's L. C. 286.

³ See 8 C. & P. 594, per Ludlow, Sergt., *arguendo*; *Taylor's Ex.* § 609,

from which this section is derived; and see *infra*, § 247.

⁴ *Rudd v. Wright*, 1 Ph. Ev. 314; 4 Y. & C. Ex. 294; *Doe v. Beviss*, 7 C. B. 456; *Taylor's Ex.* § 644.

⁵ *Knight v. Waterford*, 4 Y. & C. Ex. 283. See *Marks v. Lahee*, 3 Bing. N. C. 408.

of taxes, were received as evidence against a surety that the money had been paid; although the persons who paid it were living, and might have been called, and although the entries were contained in a private note-book, and not a public account-book.¹ Oral as well as written declarations are receivable in this category.² Nor is it necessary that the declarant should have been competent, if living, to testify to the facts stated in the declaration.³

§ 233. The declarations of the declarant cannot be received to prove their own admissibility. It is necessary that extrinsic evidence should be given to show that the person making the entry or declaration was in the situation in which he purports to be. The character of the party making the entry or declaration must be established before the entry is read, unless it be made by a person in a public character, in which case due appointment will be presumed.⁴

§ 234. So, where the writing purports to have been by an agent, agency, as we will further see, must be first shown.⁵ But entries over thirty years old, produced from the proper custody, prove themselves.⁶ And books, coming from the proper depository may in themselves exhibit *primâ facie* proof of the authority of the person by whom they are made.⁷

§ 235. The question now before us becomes of interest in connection with the entries of agents when brought into view for the purpose of charging principals. So far as this touches admissions by agents, it is reserved for discussion in other sections.⁸ It is enough, at present, to say that where an account is sought to be put in evidence as the self-disserving declaration of a deceased person, it

¹ Middleton v. Melton, 10 B. & C. 317; Powell's Evidence (4th ed.), 201. See, also, Rowe v. Brenton, 3 M. & R. 268.

² Stapylton v. Clough, 2 E. & B. 933; Fursdon v. Clogg, 10 M. & W. 572; R. v. Birmingham, 1 B. & S. 763.

³ Doe v. Bevis, 7 C. B. 456; Whaley v. Carlisle, 17 Ir. Law R. (N. S.) 792.

⁴ Davies v. Morgan, 1 C. & J. 587; Powell's Evidence, 4th ed. 202.

⁵ De Ruten v. Farr, 4 Ad. & El. 53. See Short v. Lee, 2 Jac. & W. 467.

⁶ Supra, §§ 194-95; infra, § 703; Doe v. Michael, 17 Q. B. 276; Wynne v. Tyrwhitt, 4 B. & Ald. 376.

⁷ Doe v. Thynne, 10 East, 206; Atty. Gen. v. Stephens, 1 Kay & J. 724; Mayor v. Warren, 5 Q. B. 773. See Brune v. Thompson, C. & Marsh.

⁸ Supra, §§ 194-5.

⁸ See infra, § 1183.

cannot be received unless it be proved that the account was either written, or signed, or authorized, or adopted, by the deceased person made chargeable thereby; and, therefore, where a rental, in which a deceased steward was debited with the receipt of certain payments, was written by a party since dead, styling himself clerk to such steward, the court refused to receive it as a declaration against the interest of the steward, as no parol evidence had been given to show that he ever employed the writer to make the entries; and it was equally inadmissible as made against the interest of the clerk, because it did not purport to charge the clerk.¹

✓ § 236. But it is not necessary that the accounts should be in the handwriting of the alleged deceased declarant, or should bear his signature; they will be received in evidence, if they were written by him either wholly² or in part,³ though they were not signed; or if they were signed by him, though they were written by a stranger.⁴ Nor is it essential that they should be written or signed by the deceased, if either direct proof can be furnished that they were written by his authorized agent,⁵ or if that fact can be indirectly established, as, for instance, by showing that the deceased subsequently adopted the accounts as his own, and exhibited them at an audit.⁶ The extreme length has even been reached of holding that it does not exclude such evidence that the person who wrote accounts was alive at the time of the trial, though, in such case, his non-production may be matter of observation to the jury.⁷

§ 237. Statements by a deceased possessor of real estate, to the effect that he held but a limited interest therein, are admissible, not only against his successors in title or possession,⁸ but against strangers. It is not within the range of probability that a man should make a false

Statements in disparagement of title receivable against strangers.

¹ *De Rutzen v. Farr*, 4 A. & E. 53; 5 N. & M. 617, *S. C.*

² *Rowe v. Brenton*, 3 M. & R. 268-270.

³ *Doe v. Colcombe*, C. & Marsh. 155, per Coleridge, J.

⁴ *Doe v. Stacey*, 6 C. & P. 139, per Tindal, C. J.

⁵ *Bradley v. James*, 13 Com. B. 822. *Supra*, § 235.

⁶ *Doe v. Hawkins*, 2 Q. B. 212; 1 G. & D. 551, *S. C.*; *Doe v. Mobbs*, C. & Marsh. 1; *May. of Exeter v. Warren*, 5 Q. B. 773; *Att. Gen. v. Stephens*, 1 Kay & J. 740, per Wood, V. C.

⁷ 2 Q. B. 217, per Patteson, J.

⁸ See *infra*, § 1156 *et seq.* *Redman v. Gery*, L. R. 1 Q. B. D. 161.

understatement of his title; and such admissions, therefore, are receivable not only against those claiming under him, but against those in no manner of privity with him.¹ But a distinction has here been taken between the admissions of a possessor as to the limited extent of his title, and admissions made by him as to incumbrances or claims against the estate. It is very improbable, so has it been argued, that a man will untruly disparage his own title; but it is not at all unlikely that a tenant for years, or a life tenant, would untruly admit that a right of way or other easement incumbered the land.² Hence it has been held that admissions by a deceased possessor of land going merely to incumber or restrict the enjoyment of an estate (as distinguished from those limiting the title), cannot be received to affect strangers, though receivable against the declarant's privies.³

VIII. EXCEPTION AS TO BUSINESS ENTRIES OF DECEASED PERSONS.

§ 238. An accountant, or other business agent, may be regarded as a member of a well adjusted business machine; noting, in the proper time, and in the proper way, what it is his duty to note. If he has no personal motive to swerve him, the inference is that what he does in this way he does accurately; and his evidence, if there be nothing to impeach it, rises in authority precisely to the extent to which he is to be regarded as a mechanical and self-forgetting register of the events which his accounts are offered to prove. Hence it is that the memoranda, or book entries, of an officer, agent, or business man when in the course of his duties, become evidence, after his decease, or after he has passed out of the range of process, of the truth of such entries;

¹ *Davies v. Pierce*, 2 T. R. 53; *Brooks*, 61 Penn. St. 407. See for *Peaceable v. Watson*, 4 Taunt. 18; other cases fully infra, §§ 1156-7.

Carne v. Nicoll, 1 Bing. (N. C.) 430;

² *Infra*, § 1161.

Doe v. Jones, 1 Camp. 367; *Doe v. Langfield*, 16 M. & W. 497; *Garland v. Cope*, 11 Ir. L. R. 514; *Mountnoy v. Collier*, 1 E. & B. 630; *Beedy v. Macomber*, 47 Me. 451; *Blake v. Everett*, 1 Allen, 248; *Marcy v. Stone*, 8 Cush. 4; *Spaulding v. Hallenbeck*, 35 N. Y. 204; *Horn v.*

³ *R. v. Bliss*, 7 A. & E. 550; *Daniel v. North*, 11 East, 375; *Scholes v. Chadwick*, 2 M. & Rob. 507; *Tiekle v. Brown*, 4 A. & E. 378; *Papendick v. Bridgewater*, 5 E. & B. 166; *Hill v. Roderick*, 4 Watts & S. 221; *Pool v. Morris*, 29 Ga. 374. *Infra*, § 1161.

subject, however, to be excluded if it appear that in making the entries he was not registering, but manufacturing, current facts; and provided such entries were original, contemporaneous, and in the line of the writer's duty.¹

§ 239. Receipts of a deceased public officer have been held admissible, by force of this rule, although such receipts are not entered in the course of business in a book kept by the officer.²

¹ Best's Ev. § 501; Webster v. Webster, 1 F. & F. 401; Price v. Earl of Torrington, 1 Salk. 285; 2 Ld. Ray. 873; S. C. 1 Smith's Lead. Cas. 5th ed. 277; Doe v. Turford, 3 B. & Ad. 890; Rawlins v. Rickards, 28 Beav. 370; Bright v. Legerton, 2 De Gex, F. & J. 606; Nichols v. Webb, 8 Wheat. 326; James v. Wharton, 3 McLean, 492; Beale v. Pettit, 1 Wash. C. C. 241; Cass v. Bellows, 31 N. H. 501; Welsh v. Barrett, 15 Mass. 380; Union Bank v. Knapp, 3 Pick. 96; Porter v. Judson, 1 Gray, 175; Walker v. Curtis, 116 Mass. 98; Chenango v. Lewis, 63 Barb. 111; Livingston v. Arnoux, 56 N. Y. 518; Philadel. Bk. v. Officer, 12 S. & R. 49; Ridgway v. Bk. 12 S. & R. 256; Bland v. Warren, 65 N. C. 372; Field v. Boynton, 33 Ga. 239; Clemens v. Patton, 9 Porter, 289; Stewart v. Conner, 9 Ala. 803; Mayson v. Beazley, 27 Miss. 106.

² "Entries and memoranda, made by persons since deceased, in the ordinary course of professional and official employment, are competent secondary evidence of the facts contained in them, where they had no interest to misrepresent or misstate them. 1 Greenl. Ev. § 115; Nichols v. Webb, 8 Wheat. 326. They are admitted from necessity. In Leland v. Cameron (31 N. Y. 115), the entry by an attorney in his register, in the proceedings in the action, of the issuing of an execution which could not be found, was held, the attorney being

dead, to be competent evidence of the fact that the execution was issued. Nor is it necessary, as the defendant claims, that the entry should have been made in a book, to make the evidence admissible. No cases have been cited which proceed upon this distinction, and there is no principle upon which it can be supported. See Porter v. Judson, 1 Gray, 175; Doe v. Turford, 3 B. & Ad. 898.

"The receipt given by the sheriff in this case related to a fact known to him, and to which, if living, he would have been competent to testify; it was given in conformity with the usual practice in transactions involving the payment of money, and all the parties concerned in the matter to which it relates are dead. The general fact of redemption shown by the receipt is corroborated by the other facts in the case. The long delay of the purchaser in procuring a deed from Westervelt, who was living as late as 1860; the small amount for which the land was sold, compared with its real value; the holding under Price's title of these and the other premises sold on the execution, for eighteen years, no claim at any time, so far as it appears, having been made that the other parcels of land sold at the same time had not been redeemed, nor any assertion of right to these premises by the purchaser until the sheriff's deed was executed, are circumstances supporting the conclusion that a redemption was made. It is

§ 240. The book entries of a deceased clerk have on this principle been constantly admitted; the fact that they are made as original entries in the course of business being first shown.¹ The rule has been extended to the entries of a clerk out of the jurisdiction of the court,² though if the witness is procurable, the entry is of course inadmissible.³

not necessary to hold that receipts of public officers for money paid to them, which they are authorized to receive, are primary evidence of the fact of payment; but they are competent secondary evidence, after the officer's death, within the general principle upon which entries and memoranda of persons, since deceased, are admitted. *Harrison v. Blades*, 3 Camp. 457; *Jones v. Carrington*, 1 C. & P. 327; *Ibid.* 497; *Lessee of Cluggage v. Swan*, 4 Binn. 150.

“The receipt was admissible on another ground. The officer thereby charged himself with the money, and rendered himself accountable for it to the creditor. It was an admission against his interest, made in respect to a matter pertaining to his official duty. Written memoranda, made under such circumstances, may reasonably be assumed to be truthful, and are evidence after the death of the party who made them, as well of the fact against his interest, as of the other incidental and collateral facts and circumstances mentioned, and are admissible, irrespective of the fact whether any privity exists between the person who made them and the party against whom they are offered. *Doe v. Robson*, 15 East, 32; *Davies v. Humphreys*, 6 M. & W. 153; *Perceival v. Nanson*, 7 Exch. 1; *Marks v. Colnaghi*, 3 Bing. N. C. 408; *Higham v. Ridgway*, 1 East, 109. The general presumption is that an instrument was made at its date. *Costigan v. Gould*, 5 Den. 290. Some excep-

tions exist which it is not now material to notice. *Houlston v. Smyth*, 2 C. & P. 22; *Roseboom v. Bellington*, 17 John. 182. The date of the payment in the receipt was not collateral to the main purpose for which it was given. The time of payment was material, as the redemption must be made within the year, and the true date of the transaction would naturally be stated in it.” *Andrews, J., Livingston v. Arnoux*, 56 N. Y. 518. See, as to presumption from date, *infra*, § 977. And see *Kennedy v. Doyle*, 10 Allen, 165, quoted *infra*, § 654.

¹ *R. v. St. Mary's, Warwick*, 22 L. J. M. C. 109; *Pritt v. Fairclough*, 3 Camp. 305; *Doe v. Langfield*, 16 M. & W. 497; *Fendall v. Billy*, 1 Cranch C. C. 87; *Owen v. Adams*, 1 Brock. 72; *Beaver v. Taylor*, 1 Wall. 637; *Gale v. Norris*, 2 McLean, 469; *James v. Wharton*, 3 McLean, 492; *Bacon v. Vaughn*, 34 Vt. 73; *Lapham v. Kelly*, 35 Vt. 195; *Jones v. Howard*, 3 Allen, 223; *Halliday v. Martinet*, 20 Johns. R. 168; *Brewster v. Doane*, 2 Hill, 537; *Nichols v. Goldsmith*, 7 Wend. 160; *Clarke v. Magruder*, 2 Har. & J. 77; *Lewis v. Norton*, 1 Wash. (Va.) 76; *Freeland v. Field*, 6 Call, 12; *Bland v. Warren*, 65 N. C. 372; *Batre v. Simpson*, 4 Ala. 305; *Everly v. Bradford*, 4 Ala. 371; *Grant v. Cole*, 8 Ala. 519.

² *James v. Wharton*, 3 McLean, 492; *Hodge v. Higgs*, 2 Cranch C. C. 552; *Coolidge v. Brigham*, 5 Mete. 68; *contra*, *Brewster v. Doane*, 2 Hill (N. Y.), 537.

³ *Nichols v. Webb*, 8 Wheat. 326.

§ 241. As illustrations of the rule may be mentioned the reception (not merely because it was a business entry, but because, as we have already seen, it was against interest) of the entry by a deceased solicitor, in his diary, of a note stating his attendance on a client on a certain day for the purpose of executing a deed, the object being to prove the due execution of the deed;¹ and for the purpose of proving the sending a letter, of an insertion, in the plaintiff's letter book, by a deceased clerk, of a memorandum stating the sending of the letter in question, which was duly copied in the letter book.²

§ 242. In the case which Mr. Smith has selected as leading on this topic,³ as reported in *Salkeld*, the plaintiff, being a brewer, brought an action against the Earl of Torrington for beer sold and delivered; and the evidence given to charge the defendant was, that the usual way of the plaintiff's dealing was, that the draymen came every night to the clerk of the brew-house and gave an account of the beer they had delivered out, which he set down in a book kept for that purpose to which the draymen set their names; that the drayman was dead, but that this was his hand set to the book. This was held good evidence of a delivery, but otherwise of the shop-book itself singly, without more.⁴ In a modern case, of high authority,⁵ the lessor of the plaintiff (the suit being ejectment) had instructed A. to serve the defendant with notice to quit. A. intrusted the commission to his partner B., who had not served such notices before. B. prepared three notices to quit (two of them being for service on other persons), and as many duplicates. He then went out, and on his return delivered to A. three duplicate notices (one of which was a duplicate of the notice to the defendant), indorsed by B. It was proved that the two other notices had been served on the persons for whom they were intended; that the defendant had subsequently requested A. that he might not be compelled to leave, and that it was the invariable practice for A. and B.'s

¹ *Rawlins v. Rickards*, 28 Beav. 370. See *Bright v. Legerton*, 2 De Gex, F. & J. 606; modifying *S. C.* 20 Beav. 60. See as to maps, § 665.

² *Pritt v. Fairclough*, 3 Camp. 305. See, however, *Davis v. Lloyd*, 1 C. & Kir. 275, in which Lord Denman re-

jected the entry of circumcision by a deceased chief rabbi in the book kept for such purpose.

³ *Price v. Torrington*, 1 Salk. 285; 2 Ld. Ray. 893; 1 Smith L. C. 277.

⁴ *Powell's Evidence*, 4th ed. 207.

⁵ *Doe v. Turford*, 3 B. & Ad. 890.

clerks, who usually served the notices to quit, to indorse, on a duplicate of such notice, a memorandum of the fact and time of service. It was held, on these facts, that the third duplicate was admissible to prove that the notice had been served on the defendant. Parke, B., said: "It was proved to be the ordinary course of this office, that when notices to quit were served, indorsements like that in question were made; and it is to be presumed that the principal observed the rule of the office as well as the clerks." And Taunton, J., added: "A minute in writing like the present, made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business, corroborated by other circumstances, which render it probable that that fact occurred, is admissible in evidence."¹

§ 243. But such entries must be made under a sense of business responsibility. If the mere private memoranda of the writer, they cannot, unless self-disserving, be received.² Thus in a case before the queen's bench,³ to prove a settlement by hiring and service, the following document, made, according to personal custom, in the memorandum book and handwriting of the pauper's deceased master, was tendered: "April 4, 1824. W. W. (the pauper) came, and to have for the half year 40s. September 29. Paid this £2. October 27. Ditto came again; and to have 1s. per week; to March 1825, is 21 weeks 2 days, £1 1s. 6d. 25th. Paid this." The court held this evidence to have been rightly rejected. Lord Denman said: "In a case of this kind the entry must be against the interest of the party who writes it, or made in the discharge of some duty for which he is responsible. The book here does not show any entry operating against the interest of the party. The memorandum could only fix upon him a liability on proof that the services referred to had been performed; and whether, on dispute, a jury would have found him liable for the sum so entered, or more or less, we cannot say."⁴

§ 244. So, more recently, it has been held that the entry must not only be made at once, but confined to the matters which it is the duty of the writer to record.⁵

¹ Powell's Evidence, 4th ed. 208.

² Avery v. Avery, 49 Ala. 193.

³ R. v. Worth, 4 Q. B. 133.

⁴ Powell's Evidence, 4th ed. 214.

⁵ Smith v. Blakey, L. R. 2 Q. B.

326; 36 L. J. Q. B. 160; 15 W. R.

492. Powell's Evidence, 4th ed. 209.

§ 245. Originality in respect to such entries is requisite as it is in all cases in which book entries are offered as primary proof.¹ Thus, in an action for goods sold, where the only evidence of delivery was an entry made by a witness, by the direction of a deceased foreman, who was not present when the goods were delivered, but who, in the course of business, had himself been informed of the delivery by the person whose duty it was to deliver the goods, and who was also dead, the entry was rejected.² Nor can such entries be varied by proof of subsequent facts, for this would be not only to vary them, but to destroy their originality.³

Entries
must be
original.

§ 246. We shall have occasion hereafter to see that the original entries of deceased parties in their own books are held in several jurisdictions in the United States, admissible, even though self-serving, when contemporaneous, and when confined to a transaction within the business of the party making the entry.⁴ The same limitation is applicable to the class of entries now specifically before us. "It is to be observed," said Parke, B., when arguing this point, in a case just cited,⁵ "that in the case of an entry against interest, proof of the handwriting of the party, and his death, is enough to authorize its reception; at whatever time it is made, it is admissible; but in the other case [*scil.* in declarations in

Entries
must be
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raneous
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point.

¹ See *infra*, §§ 682, 688.

² *Brain v. Preece*, 11 M. & W. 773.

³ Thus where, in order to prove service of a notice to quit; *Stapylton v. Clough*, 2 E. & B. 933; a duplicate notice, indorsed with the day of service, and signed in the course of duty by a deceased agent, was tendered; and it was also sought to explain and vary the particulars of the indorsement by evidence of subsequent oral declarations made by the deceased. But the court held that the indorsement must be received as it stood; and Lord Campbell said: "I agree with what I am reported to have said in the *Sussex Peerage* case, that there is no distinction between verbal and written declarations made in the course

of a duty, so far as regards their admissibility. But to deduce from this doctrine that whatever is said subsequently to the time of making the entry respecting the transaction may be admitted in evidence, would lead to the greatest injustice. How can it be said that the verbal declaration of Jackson was made in the course of his duty? What he did in discharging his duty was signing the written entry. What he may babble during the rest of his life on the subject cannot be admitted in evidence, contradicting, as it does here, what he has before written." *Powell's Evidence*, 4th ed. 213. As to maps, see § 665.

⁴ See *infra*, § 678 *et seq.*

⁵ *Doe v. Turford*, 3 B. & Ad. 890.

the course of business], it is essential to prove that it was made at the time it purports to bear date: it must be a contemporaneous entry." So it is said by Tindal, C. J., "If there were any doubt whether the entry were made at the time of the transaction, the case ought to go down to trial again."¹

§ 247. In a case argued in the exchequer chamber, where an entry of a deceased under sheriff was offered to prove an arrest,² Lord Denman, in delivering judgment, said: "We are all of opinion that, whatever effect may be due to an entry, made in the course of any office, reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances. Admitting, then, for the sake of argument, that the entry tendered was evidence of the fact, and even of the day when the arrest was made (both which facts it might be necessary for the officer to make known to his principal), we are all clearly of opinion that it is not admissible to prove in what particular spot within the bailiwick the caption took place, that circumstance being merely collateral to the duty done." In submission to this view an entry by a deceased steward of a matter not in the course of his duty, but only important, in his opinion, to his master's interest, has been rejected.³

§ 248. So the declaration of a deceased surveyor, with regard to lines run by him in discharge of his official duties, are admissible;⁴ and so of the field notes and other memo-

¹ Poole v. Dicas, 1 Bing. (N. C.) 649. See, also, Short v. Lee, 2 Jac. & W. 475; Doe v. Beviss, 7 C. B. 456; Doe v. Skinner, 3 Ex. R. 88; Cass v. Bellows, 31 N. H. 501; Porter v. Judson, 1 Gray, 175; Walker v. Curtis, 116 Mass. 98; Livingston v. Arnoux, 56 N. Y. 518; Forsythe v. Norcross, 5 Watts, 432.

² Chambers v. Barnasconi, 1 C., M. & R. 368; 1 Tyr. 335; 4 Tyr. 531.

³ Doe v. Skinner, 2 Ex. 384; Doe v. Whitcomb, 6 Ex. 601. "It is right to observe that the decision on the particular facts in Chambers v. Ber-

nasconi, has been much criticised by learned judges and other authorities; but the principle on which it was given, namely, that the act was not in the course of a duty, but collateral to it, is recognized as settled. Poole v. Dicas, 1 Bing. (N. C.) 649; Smith v. Blakey, L. R. 2 Q. B. 326; 36 L. J. Q. B. 160; 15 W. R. 492." And see Percival v. Nanson, 7 Ex. R. 3; Powell's Evidence, 4th ed. 211. See *supra*, § 231.

⁴ Birmingham v. Anderson, 40 Penn. St. 506. See Bonnet v. Devebaugh, 3 Binn. 175.

randa of a deputy surveyor.¹ Such entries, however, must be identified in order to be admitted.²

§ 249. So notes of deceased counsel of a former trial are admissible,³ and so of counsel or other officers who are out of the reach of the process of the court;⁴ or have become insane;⁵ and so of deceased counsel, in relation to office business, in order to corroborate other witnesses.⁶

§ 250. The rule has been extended so as to admit a bank messenger's entries in his book, recording notices given him as messenger, after he has absconded, or is from any cause out of reach of process.⁷

§ 251. The entries in the books of deceased notaries are admissible, under the general rule, when made in the course of their business;⁸ and so of entries made in notaries' books by deceased clerks.⁹

¹ *Walker v. Curtis*, 116 Mass. 98; *Halliday v. McDougall*, 20 Wend. 81, 264; *Gawtry v. Doane*, 51 N. Y. 90; *McCormick v. McMurtrie*, 4 Watts, 192; *Goddard v. Gloninger*, 5 Watts, 209; *Russell v. Werntz*, 24 Penn. St. 337; *McCausland v. Fleming*, 63 Penn. St. 36. See *Ellicott v. Pearl*, 1 McLean, 206; *Ayer v. Sawyer*, 32 Me. 163; *Ross v. Rhoads*, 15 Penn. St. 163; *Ijams v. Hoffman*, 1 Md. 423; *Richardson v. Carey*, 2 Rand. (Va.) 87; *Free v. James*, 27 Conn. 77.

² *Free v. James*, 27 Conn. 77; *Bladen v. Cockey*, 1 Har. & M. 230; *Meehan v. Williams*, 48 Penn. St. 238.

³ *Supra*, § 180.

⁴ *Alter v. Berghans*, 8 Watts, 77; *Hay v. Kramer*, 2 Watts & S. 137; *Flanagin v. Leibert*, Bright. (Penn.) 61; though see *Love v. Payton*, 1 Overt. 255.

⁵ *Union Bank v. Knapp*, 3 Pick. 96.

⁶ *Moffat v. Moffat*, 10 Bosw. (N. Y.) 468.

⁷ *Welsh v. Barrett*, 15 Mass. 380; *North Bank v. Abbot*, 13 Pick. 465; *Shove v. Wiley*, 18 Pick. 558; *Washington Bank v. Prescott*, 20 Pick. 339.

⁸ *Sutton v. Gregory*, Pea. Add. Cas. 180; *Poole v. Dieas*, 1 Bing. (N. C.) 649; *Homes v. Smith*, 16 Me. 181;

⁹ "The entries of the deceased clerk in the register of the notary, made in the ordinary and usual course of business, were properly received in evidence. The entries were made in a book kept for the notary for that purpose by the clerk, whose duty it was to transact the particular business and to make the entries. It is not questioned that the clerk was competent to make presentment and demand of the note, so as to charge the indorser. The entries made by a deceased clerk under such circumstances are the best attainable evidence. They are made under such circumstances as to furnish a strong presumption that they are true, and they are received to prevent a failure of justice, and because public convenience and the interest of trade and commerce demand it. In *Welch v. Barrett* (15 Mass. 379),

So of counsel and other officers.

So of notaries' entries.

VIII. EXCEPTION AS TO GENERAL REPUTATION WHEN SUCH IS MATERIAL.

§ 252. To prove cognizance of a particular fact, it has been held admissible, under circumstances to be hereafter noticed, to show that such fact was at the time generally known and talked about in the neighborhood where the party in question resided, or was a matter of common reputation in the business community to which both parties belonged.¹ It is on this ground that proof of notorious usage has been received,² as well as evidence of character, when character is introduced as infecting another with notice.³

§ 253. But evidence of general reputation must be in such cases received only as one among other cumulative modes of proving the condition of a particular person's mind as to a certain issue. General reputation is inadmissible to prove any objective fact. Thus, when the ques-

the book of the messenger of a bank, not a notary, who was dead, in which in the course of his duty he entered memoranda of demands and notices to the promisors and indorsers upon notes left in the bank for collection, was received as evidence of a demand of the maker and notice to the defendant as indorser of a note so left for collection. In *Nichols v. Goldsmith*, 7 Wendell, 162, the memorandum of a deceased cashier of a bank who frequently notified indorsers of non-payment of notes in the name of the acting notary of the bank, that on a certain day he sent notice by mail to an indorser, was held to be competent, and *prima facie* sufficient evidence to charge the indorser. In *Sheldon v. Benham*, 4 Hill, 129, it was held that the memorandum of a deceased teller of a bank, made in the usual course of his employment, is competent evidence in proving a demand by him of the maker of a note and notice to the indorsers, and this whether he attended to the business

on the retainer of a notary or as part of his duty to the bank. But it is claimed that the common law rule, which admits this species of evidence, is abrogated by the provisions of the Revised Statutes (2 R. S. 284, §§ 46, 47,) which relate to the proof of entries made by deceased, insane, or absent notaries. It is a sufficient answer to this claim that the entries proved in this case were not those of a deceased notary, and hence were in no way affected by the statute. They were competent common law evidence, and were received as such." *Earl, C., Gawtry v. Doane*, 57 N. Y. 90.

¹ *Sheen v. Bumpstead*, 2 H. & C. 193; *Lee v. Kilburn*, 3 Gray, 594; *Benoist v. Darby*, 12 Mo. 196; *Ward v. Herndon*, 5 Port. 382; *Jones v. Hatchett*, 14 Ala. 743; *Stallings v. State*, 33 Ala. 425; and cases cited *infra*, § 254. See, however, *Bradbury v. Bardin*, 34 Conn. 452; and *Lockhardt v. Jelly*, 19 L. T. N. S. 659.

² *Infra*, § 962.

³ *Supra*, § 49.

tion is whether B. had reasonable grounds to believe A. to be insolvent, it is admissible to prove, as one among other links, that it was generally reputed through the neighborhood that A. was utterly bankrupt.¹ But to prove such insolvency, or to prove any other objective fact, general reputation cannot be received.² So evidence of a rumor is inadmissible to justify a slander.³ On the other hand, in trespass for destroying a picture, when the plea was not guilty, and the defence that the picture was a libel on the defendant's sister and brother-in-law, and that he had therefore destroyed it, Lord Ellenborough held, "that the declarations of the spectators while they looked at the picture in the exhibition room were evidence to show that the figures portrayed were meant to represent the defendant's sister and brother-in-law."⁴

§ 254. It may happen that a question at issue is whether certain things were said at a particular time, independently of the truth of what is thus said. If so, proof that such things were said is admissible, though hearsay. The question, for instance, is, whether certain acts of violence are excusable; and on such an issue it would be admissible, for the reason here given (if for no other), to prove certain exclamations of terror or of threat, without calling the persons by whom such exclamations were uttered.⁵ So when the issue is whether a railroad officer acted prudently at the time of a collision, there can be no question that cries of alarm uttered at the time, or even telegrams delivered an hour or two before, could be received, if relevant, without calling the persons from whom either cries or telegrams issued. So when the issue is whether a bankrupt has denied himself, answers given at his door, deny-

Hearsay
admissible
when the
issue is
hearsay.

¹ *Lee v. Kilburn*, 3 Gray, 594; *Ward v. Herndon*, 5 Port. 382; *Angell v. Rosenbury*, 12 Mich. 241.

² *Heath v. West*, 26 N. H. 191; *Hicks v. Cram*, 17 Vt. 449; *Goddard v. Pratt*, 16 Pick. 412; *Trowbridge v. Wheeler*, 1 Allen, 162; *Baldwin v. R.* 4 Gray, 333; *Dunbar v. Mulry*, 8 Gray, 163; *Martin v. Good*, 14 Md. 398; *Molyneaux v. Collier*, 13 Ga. 406; *Blevins v. Pope*, 7 Ala. 371; *Walker v. Forbes*, 25 Ala. 139; *Mosser v.*

Mosser, 32 Ala. 551; *Vaughan v. Warrnell*, 28 Tex. 119.

³ *Lockhardt v. Jelly*, 19 L. T. N. S. 659.

⁴ *Du Bost v. Beresford*, 2 Camp. 511; *Powell's Evidence* (4th ed.), 118.

⁵ See *Com. v. Daley*, Appen. to Whart. on Homicide; *R. v. Vincent*, 9 C. & P. 275; *Redford v. Birley*, 3 Stark. 88.

ing him, can be proved without calling the persons who gave the answers.¹

It is often important, also, to ascertain the condition of a party's mind at a particular time. The claimant in the Tichborne case, to take another illustration, when in Australia, conceived the idea of coming to England to claim the Tichborne estates; and it became material, therefore, to put in evidence the statements made to him, by attorneys and others, as to the condition of the Tichborne family; the belief of the mother in the recovery of her lost son; and the peculiar characteristics which this son was expected, should he return, to exhibit. A collision occurs in a hotel in New York, in which two men, each armed, exchange shots. One is killed; and the question comes up as to who was the aggressor. It is admissible, both as to the defendant and the deceased, to prove that statements had been made to each of a character making it prudent for him to go armed.² In fine, any facts, hearsay or not, which go to explain the condition of a person's mind, when such condition is at issue, may be received.³

§ 255. As value, in its business sense, consists largely of the opinions of persons familiar with a market, and as these opinions are made up in a measure of what is said by others, hearsay is a primary evidence of value. In proving value, therefore, it is admissible to resort to hearsay.⁴

§ 256. Whenever character is at issue, then, as is elsewhere more fully seen, evidence of general reputation is admissible. Reputation is in such sense the only mode in which character can be exhibited to us.⁵

IX. HEARSAY TO REFRESH MEMORY.

§ 257. It may be that a witness's memory is uncertain as to

¹ Crosby v. Percy, 1 Taunt. 364. See Key v. Shaw, 8 Bing. 320.

² See this topic discussed in Whart. on Homicide, §§ 493, 694.

³ See supra, § 252; infra, § 672; Whart. on Hom. §§ 693-4. See Bartlett v. Decreet, 4 Gray, 113; Sheen v. Bumpstead, 2 H. & C. 193; Lee v. Kilburn, 3 Gray, 594; and see cases cited supra, § 234.

⁴ See infra, §§ 447-450; though see supra, § 175.

⁵ See supra, § 49; Fountain v. Boodle, 3 Q. B. 5; Humphrey v. Humphrey, 7 Conn. 116; Anderson v. Long, 10 S. & R. 55; Atkinson v. Graham, 5 Watts, 411; Vicksburg R. R. Co. v. Patton, 31 Miss. 156.

the date or place of an incident he narrates, to which date and place are material. To refuse to permit him to recall conversations with others by which such circumstances would be fixed, might prejudice the truth, not only by leaving his testimony without a definite impression, but by precluding his recollections from being either verified or contradicted. Hence, conversations with third persons have been sometimes held not inadmissible when introduced for the purpose of identifying facts or dates. It is scarcely necessary to observe that such conversations are not evidence of the truth of facts which they state. They are evidence only on the single point of fixing particular dates, places, or other extrinsic incidents of the facts testified to by the witness.¹

Collateral
hearsay
admissible
to refresh
memory as
to inci-
dents in
chief.

X. EXCEPTION AS TO RES GESTAE.

§ 258. The area of events covered by the term *res gestae* depends upon the circumstances of each particular case. When a business man, coolly and disengagedly, completes half a dozen distinct negotiations in the course of an hour, the sweep taken by the *res gestae* in each case is limited to what is done in the time of the particular negotiation.² When, however, one man, of high parts and great energy, is employed in a single protracted negotiation of great importance, then we can conceive of his whole time for weeks being absorbed in the negotiation, and of its so tinging with its characteristics everything that he does and says that for all this period the things which he does and says become rather the incidents of the negotiation than of himself.³ So if in one of our streets there is an unexpected collision between two men, entire strangers to each other, then the *res gestae* of the collision are confined within the few moments that it occupies. When, again, there is a social feud, in which two religious factions, as in the case of the Lord George Gordon disturbances, or of the Philadelphia riots of 1844, are arrayed against each other for weeks, and so much absorbed in

Res gestae
admissible
though
hearsay.

¹ Phil. R. R. v. Stimpson, 14 Pet. 448; Hill v. North, 34 Vt. 604; Brown-
ing v. Skillman, 24 N. J. L. 351; State
v. Fox, 25 N. J. L. 566. See infra,
§ 519.

² Miles v. Knott, 12 Gill & J. 442.

³ Fifield v. Richardson, 31 Vt. 410;
Cunningham v. Parks, 97 Mass. 172;
Muscoigne v. Radd, 51 Ga. 33.

the collision as to be conscious of little else, then all that such parties do and say under such circumstances is as much part of the *res gestae*, as the blows given in the homicides for which particular prosecutions may be brought.¹

§ 259. The *res gestae* may be therefore defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act.² These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander; they may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculated policy of the actors. In other words, they must stand in immediate causal relation to the act,—a relation not broken by the interposition of voluntary individual wariness, seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act.³

¹ See rulings substantially to this effect in *Com. v. Sherry*, and *Com. v. Daley*, reported in the Appendix to *Whart. on Homicide*. See, also, *R. v. Gordon*, 21 How. St. Tr. 542.

² See *Nutting v. Page*, 4 Gray, 584.

³ *Bateman v. Bailey*, 5 T. R. 512; *Rawson v. Haigh*, 2 Bing. 99; *Smith v. Kramer*, 1 Bing. N. C. 585; *Lord v. Colvin*, 4 Drew. 366; *U. S. v. Omeara*, 1 Cranch C. C. 165; *Jewell v. Jewell*, 1 How. 219; *Flint v. Trans. Co.* 7 Blatchf. 536; *Clark, in re*, 9 Blatchf. 379; *Corinth v. Lincoln*, 34 Me. 310; *Cornville v. Brighton*, 39 Me. 333; *Plumer v. French*, 22 N. H. 450; *Newman v. Bean*, 21 N. H. 93; *Ather-ton v. Tilton*, 44 N. H. 452; *Fifield v. Richardson*, 34 Vt. 310; *Lund v. Tyngsborough*, 9 Cush. 36; *Boston R. R. v. Dana*, 1 Gray, 83; *Blake v. Damon*, 103 Mass. 199; *Parker v. Steamboat*

Co. 109 Mass. 449; *Com. v. Vosburg*, 112 Mass. 419; *Russell v. Frisbie*, 19 Conn. 205; *Haight v. Haight*, 19 N. Y. 464; *Jones v. Brownfield*, 2 Penn. St. 55; *Rees v. Livingston*, 41 Penn. St. 113; *Henry v. Warehouse Co.* 2 Notes of Cases, 389; *Handy v. Johnson*, 5 Md. 450; *Curtis v. Moore*, 20 Md. 93; *Amick v. Young*, 69 Ill. 542; *Paul v. Berry*, 78 Ill. 158; *Boone Bank v. Wallace*, 18 Ind. 82; *Hamilton v. State*, 36 Ind. 281; *Simmons v. Rust*, 39 Iowa, 241; *State v. Rawles*, 65 N. C. 334; *Mitchum v. State*, 11 Ga. 615; *Printup v. Mitchell*, 17 Ga. 558; *Clayton v. Tucker*, 20 Ga. 452; *Southwest R. R. v. Rowan*, 43 Ga. 411; *Powell v. Olds*, 9 Ala. 861; *Sanford v. Howard*, 29 Ala. 684; *Autauga v. Davis*, 32 Ala. 703; *Bragg v. Massie*, 38 Ala. 89; *Mobile R. R. v. Ashcraft*, 48 Ala. 15; *Mann v. Best*,

Thus, in an action for false imprisonment, the defendant justified on the ground that he had given the plaintiff in custody for forging a bill of exchange, which had been dishonored on presentment to the drawee. A witness stated that he had accompanied the defendant to the drawee, who refused to pay. He was then asked what the drawee had said at the time of the refusal. The question was objected to, but the court held that the evidence was part of the *res gestae*. There were peculiar circumstances in the case, but Tindal, C. J., said: "Even if the inquiry before us had depended on the determination of the point, whether evidence by the defendant of the dishonor of the bill, and of the circumstances attending such dishonor, was relevant to the question then before the jury, it would have been difficult altogether to exclude such evidence on the score of its irrelevancy."¹

§ 260. Another phase of illustration may be found in a Massachusetts case decided in 1872, in which, the suit being against a steamboat company for injuries to a passenger by the fall of a gangway leading from a wharf to the defendant's boat, evidence was admitted that men working at the gangway were warned, immediately before the accident, that the plank was unsafe.² So, also, it was held in the same year in Alabama, in a suit against a railroad company for injury to a passenger, where the plaintiff received his injury in leaping from a car, while others who remained inside were not hurt, that the plaintiff could put in evidence the declarations of such other persons giving their reasons for so remaining.³

§ 261. A narrative of past events, however, cannot be introduced as part of the *res gestae*.⁴ Yet again must it be remem-

62 Mo. 491; *People v. Vernon*, 35 Cal. 49; *Sill v. Reese*, 47 Cal. 294; *Rollins v. Strout*, 6 Nev. 150; *State v. Garrand*, 5 Oregon, 216.

¹ *Perkins v. Vaughan*, 4 M. & G. 988.

² *Parker v. Steamboat Co.* 109 Mass. 449.

³ *Mobile R. R. v. Ashcraft*, 48 Ala. 15. See *Indianapolis R. R. v. Anthony*, 43 Ind. 183; and see, as to admissions by agents, *infra*, § 1173.

⁴ *Hyde v. Palmer*, 3 B. & S. 657;

Peacock v. Harris, 5 A. & E. 419; *Rockwell v. Taylor*, 41 Conn. 55; *Whitney v. Durkin*, 48 Cal. 462. See cases cited *infra*, §§ 265, 1180.

"But when the declarations offered are merely narratives of past occurrences, they are incompetent. 1 Greenl. Ev. § 110. That is precisely this case. The declarations given in evidence were a mere statement of what had been done at the doctor's office, and not any part of what was then done,

bered that continuousness is not always to be measured by time. A transaction, in which the parties are absorbed, may last for weeks, so as to make, as has just been said, what is said and done in connection with it part of the *res gestae*. In this view we can understand the comments of Lord Denman,¹ concurring in a prior remark of Parke, B.,² "that it is impossible to tie down to time the rule as to the declarations" that may be made part of the *res gestae* in cases of bankruptcy; to which Lord Denman added, "that if there be connecting circumstances, a declaration may, even at a month's interval, form part of the whole *res gestae*."³

§ 262. Therefore, declarations which are the immediate accompaniments of an act are admissible as part of the *res gestae*; remembering that immediateness is tested by closeness, not of time, but by causal relation as just explained.⁴ Coincident business declarations are hence to be received to qualify the acts to which they relate.⁵ Thus, A.'s declarations in paying money, that he pays as agent of P., or in order to show the application of the money, are admissible;⁶ and so are declarations of a party, in receiving money, that more is still due him;⁷ and declarations of a party accept-

and therefore no part of the *res gestae*. See *Insurance Company v. Moseley*, 8 Wallace, 397, where a somewhat elaborate review of the authorities upon this point will be found in the opinions of the judges, and where the doctrine as to what may be regarded as part of the *res gestae* was certainly carried to its utmost limit by a majority of the court." Grover, J., *People v. Davis*, 56 N. Y. 102. See *Lees v. Martin*, 1 M. & Rob. 210.

¹ *Rouch v. R. R.* 1 Q. B. 51.

² *Rawson v. Haigh*, 5 Bing. 104; *S. C.* 9 Moore, 217.

³ See, also, *Ridley v. Gyde*, 9 Bing. 349.

⁴ *Bateman v. Bailey*, 5 T. R. 512; *Vacher v. Cocks*, 5 M. & M. 353; *Doe v. Arkwright*, 5 C. & P. 575; *Sharp v. Newsholme*, 5 Bing. N. C. 517; *Bank v. Kennedy*, 17 Wall. 19; *Sessions v. Little*, 9 N. H. 271; *Allen v.*

Duncan, 11 Pick. 308; *Kelly v. Campbell*, 2 Abb. (N. Y.) App. 492; *Reed v. R. R.* 56 Barb. 493; *Peppinger v. Low*, 1 Halst. 384; *Devling v. Little*, 26 Penn. St. 502; *Custar v. Gas Co.* 63 Penn. St. 381; *Smith v. Cooke*, 31 Md. 174; *Taylor v. Lusk*, 9 Iowa, 444; *Blake v. Graves*, 18 Iowa, 312; *Eastman v. Bennett*, 6 Wise. 232; *Brazier v. Burt*, 18 Ala. 201; *Jennings v. Blocker*, 25 Ala. 415; *Sayre v. Durwood*, 35 Ala. 247; *Patterson v. Flanagan*, 37 Ala. 513; *Weaver v. Lapsley*, 42 Ala. 601; *Criddle v. Criddle*, 21 Mo. 522; *Rogers v. Broadnax*, 27 Tex. 238; *Brazelton v. Turney*, 7 Coldw. 267; *Tevis v. Hicks*, 41 Cal. 123.

⁵ *Bank v. Kennedy*, 17 Wall. 19; *Purkiss v. Benson*, 28 Mich. 538.

⁶ *Carter v. Beals*, 44 N. H. 408; *Bank of Woodstock v. Clark*, 25 Vt. 308.

⁷ *Dillard v. Scruggs*, 36 Ala. 670. See *Webster v. Canmann*, 40 Mo. 156.

ing service of process.¹ And so of declarations of officers at the time of making levy;² of declarations of a married woman, objecting to the acknowledgment of a deed, which she acknowledges under protest;³ of declarations of public officers generally when such declarations are part of the discharge of their official duties, the *acts* being admissible;⁴ of declarations of a party, taking possession of land, as to the boundaries.⁵ As has been already noticed, however, such declarations, to be admissible, must be made during the transaction. If made after its completion, they are too late.⁶ It is no objection to such declarations that they are self-serving, if they are part of the *res gestae*.⁷

§ 263. On the same principle declarations coincident with torts are receivable.⁸ Thus, in an action against an insurance company for the loss of a ship burned by the military authorities, evidence was received as to the orders set up by the persons destroying the vessel.⁹ So it has been held¹⁰ that a husband, in defending an action against him for the board of his wife, is entitled to show her declaration confessing adultery, made immediately before he turned her off, and also letters from men found about that time in her desk. Again, in an action for enticing away the plaintiff's wife, the declarations of the wife, made immediately before or at the time she left her husband, of his cruel treatment of her, have been held com-

So of declarations coincident with torts.

¹ Feagan v. Cuneton, 19 Ga. 404.

² Arnold v. Gore, 1 Rawle, 233; Grandy v. McPherson, 7 Jones L. 347; Dobbs v. Justice, 17 Ga. 624; Morgan v. Sims, 26 Ga. 283.

³ Loudon v. Blythe, 16 Penn. St. 532.

⁴ Maher v. Chicago, 38 Ill. 266; George v. Thomas, 16 Tex. 71. In Steele v. Thompson, 3 Pen. & W. 34, where a husband was sought for at his own house, for the purpose of making a tender to him, and his wife refused to give information where he could be found, and declared that her husband would not accept the tender; these declarations were given in evidence.

⁵ Potts v. Everhart, 26 Penn. St.

493. See Norton v. Pettibone, 7 Conn. 319; Flagg v. Mason, 8 Gray, 556; Davis v. Campbell, 1 Ired. L. 482; Brewer v. Brewer, 19 Ala. 481.

⁶ Supra, § 261; infra, § 265; Rockwell v. Taylor, 41 Conn. 56; People v. Davis, 56 N. Y. 102; Whitney v. Durkin, 48 Cal. 462.

⁷ See infra, § 1110, and cases under next section.

⁸ See cases cited to § 258; infra, §§ 1173-7; R. v. Foster, 6 C. & P. 325; Courtney v. Baker, 34 N. Y. Sup. Ct. 29; Indianapolis R. R. v. Anthony, 43 Ind. 183; Harriman v. Stowe, 57 Mo. 93.

⁹ Macey v. Ins. Co. 19 La. An. 388.

¹⁰ Walter v. Green, 1 C. & P. 621.

petent evidence for the defendant.¹ So in a suit against a railroad company for the killing of a person whose representatives claim damages, the deceased's declarations immediately after the injury can be received.² So evidence of the declarations of a party taking possession of property may be received as explaining the nature or limitations of such possession.³

§ 264. What is done is part of the *res gestae* as much as is what is said ; and on this additional ground is explained a famous ruling, elsewhere noticed, that without producing flags exhibited at seditious meetings the inscriptions on such flags could be proved ;⁴ for such inscriptions used on such occasions are the public expression of the sentiments of those who bear them, and have rather the character of speeches than of writings.⁵ So a foreign proclamation, contained in a printed placard, is treated as an inscription or act done, and may be proved by oral evidence or an examined copy. In such a case, Pollock, C. B., said : " Hearsay evidence is admissible when it is part of a transaction ; and in this way the exclamations of a crowd may be received as evidence. But there is, generally speaking, this distinction between what is said and what is done : in order to admit the former it is necessary that the authority of the speaker should be shown in order to affect the parties ; but if it be something done that is to be proved, no authority is required, because there is no danger of being misled ; and I regard a placard or proclamation on a wall rather as something done. In a case before me at Guildford, where the plaintiff sought to recover the expenses of an election, I would not allow orders given by third parties by word of mouth to be admitted in evidence against the defendant, but I admitted inscriptions on coaches." ⁶

§ 265. Such declarations, however, are inadmissible if so far prior to the act as to give opportunity for their concoction in

¹ Gilchrist v. Bale, 8 Watts, 355.

² Entwistle v. Feighner, 60 Mo. 214; Harriman v. Stowe, 57 Mo. 93; Elkins v. McKean, 79 Penn. St. 493.

³ Hall v. Young, 37 N. H. 134; Blood v. Rideout, 13 Mete. (Mass.) 237; Stetson v. Howland, 2 Allen, 591; Happy v. Mosher, 47 Barb. 501; York

Bk. v. Carter, 38 Penn. St. 446; Lloyd v. Farrell, 48 Penn. St. 73; Black v. Thornton, 30 Ga. 361; Stovall v. Bank, 16 Miss. 305; State v. Schneider, 35 Mo. 533.

⁴ Supra, § 97.

⁵ R. v. Hunt, 3 B. & Ald. 574.

⁶ Bruce v. Nicolupolo, 11 Ex. 129.

way of preparation,¹ or so far afterwards, as to leave an interval of cooling time (to be measured by the circumstances of the case), in which excuses or explanations could be got up. Hence all declarations which are in the nature of a narrative of past events are inadmissible.² So proof of deliberation excludes such declarations; and for this reason a letter written to a party is inadmissible for him, though written immediately after the transaction.³ But this limitation as to time does not apply to instinctive exclamations to a physician or other attendant as to the party's bodily or mental state.⁴

Declarations inadmissible if there be opportunity for concoction.

§ 266. A declaration, also, is inadmissible for the purpose of explaining an unexecuted intent, unless the subjective condition of the party's mind is at issue.⁵ And when the quality or tone of an overt act is at issue, declarations as to such act cannot be proved, unless proof of the act itself is admissible, and the act is itself proved.⁶ So the fact of insolvency must be established, before statements of the insolvent will be admitted to show that he was aware of his embarrassed circumstances.⁷ It is true

Declarations inadmissible to explain inadmissible acts; nor are declarations admissible without acts.

¹ *Supra*, § 261. *Bangor v. Bruns-
wick*, 27 Me. 351; *Stone v. Segur*, 11
Allen, 568; *Rowell v. Lowell*, 11
Gray, 420; *Walrod v. Ball*, 9 Barb.
271; *Smith v. Betty*, 11 Grat. 752;
Wadsworth v. Harrison, 14 Iowa, 272;
Lee v. Hester, 20 Ga. 588; *Rosenbaum
v. State*, 33 Ala. 354; *Gamble v. John-
son*, 9 Mo. 605; *State v. Dominique*,
30 Mo. 585.

² *Supra*, § 260; *infra*, § 1180. *Doe
v. Webber*, 1 Ad. & El. 733; *Wilson
v. Sherlock*, 36 Me. 295; *Battles v.
Batchelder*, 39 Me. 19; *Banfield v.
Parker*, 36 N. H. 353; *Barnum v.
Hackett*, 35 Vt. 77; *Boyden v. Moore*,
11 Pick. 362; *Salem v. Lynn*, 13 Mete.
544; *Johnson v. Sherwin*, 3 Gray,
374; *Osborn v. Robbins*, 37 Barb.
481; *Spatz v. Lyons*, 55 Barb. 476;
Reed v. Dick, 8 Watts, 479; *Young
v. Com.* 28 Penn. St. 501; *Stewart v.
Redditt*, 3 Md. 67; *Hopkins v. Rich-*

ardson, 9 Grat. 485; *Gardner v. Peo-
ple*, 4 Ill. 83; *State v. Black*, 6 Jones
L. 510; *Raiford v. French*, 11 Rich.
367; *Hart v. Powell*, 18 Ga. 635; *Rut-
land v. Hathorn*, 36 Ga. 380; *Harrison
v. Harrison*, 9 Ala. 73; *Webb v. Kel-
ly*, 37 Ala. 333; *McAdams v. Beard*,
35 Ala. 478; *Hall v. State*, 40 Ala.
698; *Brand v. Abbott*, 42 Ala. 499;
Simmons v. Norwood, 21 La. An. 421;
State v. Jackson, 17 Mo. 544; *Parkey
v. Yeary*, 1 Heisk. 157.

³ *Small v. Gillman*, 48 Me. 506.

⁴ *Infra*, § 268.

⁵ *Hale v. Taylor*, 45 N. H. 405;
Lund v. Tyngsborough, 9 Cush. 36.

⁶ *Carleton v. Patterson*, 29 N. H.
580; *Morrill v. Foster*, 32 N. H. 358;
Comins v. Comins, 21 Conn. 413;
People v. Williams, 3 Parker C. R.
84; *Gilbert v. Gilbert*, 22 Ala. 529;
Fail v. McArthur, 31 Ala. 26.

⁷ *Thomas v. Connell*, 4 M. & W.

that when simply the belief of a party is in issue, such belief may be independently proved by his declarations. Thus, if the act of bankruptcy relied upon be an absenting with intent to delay creditors, a declaration by the bankrupt, that he left home to avoid a writ, will be admissible, though no evidence be given that any writ was actually out against him, because, in order to constitute this act of bankruptcy, neither writ nor pressure is in fact necessary.¹ But, even in this case, the departure from home is a substantive act, which must be proved by evidence independent of the declaration.²

§ 267. Nor, ordinarily, is it admissible to prove the narration of a witness as part of the *res gestae*, if the witness is himself obtainable on trial.³ Thus in a suit arising from a collision of carriages on a highway, the declarations of the defendant's servant, immediately after the collision, that the plaintiff was not to blame, were excluded.⁴ The opinions of a bystander, if admissible, must be proved by calling him as a witness.⁵

Narration of a witness inadmissible when the witness could himself be produced.

XI. EXCEPTION AS TO DECLARATIONS CONCERNING PARTY'S OWN HEALTH AND STATE OF MIND.

§ 268. It is well settled that the character of an injury may be explained by exclamations of pain and terror at the time the injury is received, and by declarations as to its cause.⁶ So when the nature of a party's sickness or hurt is in litigation, his instinctive declarations to his

Declaration of party as to his own injuries.

267, 269, 270; *Craven v. Halliley*, cited *Ibid.* 270, per Parke, B.; *Vacher v. Cocks*, M & M. 353.

¹ *Rouch v. R. R.* 1 Q. B. 51, 62, 63; 4 P. & D. 686, *S. C.*; *Newman v. Stretch*, M. & M. 338, per Parke, J.; *Ex parte Bamford*, 15 Ves. 449; *Robson v. Rolls*, 9 Bing. 648.

² *Rouch v. R. R.* *ut supra*.

³ *Allen v. Denstone*, 8 C. & P. 760; *Great West. R. R. v. Willis*, 18 C. B. (N. S.) 748; *Brown v. Mooers*, 6 Gray, 451; *Luby v. R. R.* 17 N. Y. 131; *Anderson v. R. R.* 54 N. Y. 334; *Williams v. Kelsey*, 6 Ga. 365; *Howell v. Howell*, 37 Mo. 124.

⁴ *Lane v. Bryant*, 9 Gray, 245. See *Robinson v. R. R.* 7 Gray. 92.

⁵ *Detroit R. R. v. Van Steinburg*, 17 Mich. 99.

⁶ *Aveson v. Kinnaird*, 6 East, 188; *R. v. Blandy*, 18 How. St. Tr. 1135; *R. v. Guttridge*, 9 C. & P. 472; *Green v. Bedell*, 48 N. H. 546; *Bacon v. Charlton*, 7 Cush. 581; *Hall v. Steamboat Co.* 13 Conn. 319; *Spatz v. Lyons*, 55 Barb. 476; *Matteson v. R.* 62 Barb. 364; *Frink v. Coe*, 4 Greene (Iowa), 555; *Brownell v. R.* 47 Mo. 239; *Harriman v. Stowe*, 57 Mo. 93; *Entwhistle v. Feigener*, 60 Mo. 214.

physician, or other attendant, during such sickness, may be received.¹ Immediate groans and gestures are in like manner admissible.² But declarations made after convalescence, or when there has been an opportunity to think over the matter in reference to projected litigation, are inadmissible.³ Thus in an action for carnally knowing the plaintiff, a girl of ten years, by force, and giving her the venereal disease, the plaintiff's statements made to a physician, three months after the event, have been ruled out.⁴ But where such subsequent declarations are part of the case on which the opinion of the physician, as an expert, is based, they have been received.⁵ When the patient is not a party, his declarations, being hearsay, are inadmissible.⁶ Except, however, for the purpose of indicating symptoms, declarations of this class are not evidence.⁷ They have, however, been received to prove the condition of a party's health prior to an alleged poisoning.⁸ In prosecutions for rape, as is well known, it is admissible to prove that the prosecutrix made complaint shortly after the outrage, though the particulars of the complaint are, it seems, inadmissible.⁹ Such declarations must be given in their substance,

¹ *Aveson v. Kinnaird*, 6 East, 188; *Roberts v. Graham*, 6 Wall. 578; *Ins. Co. v. Mosley*, 8 Wall. 397; *Howe v. Plainfield*, 41 N. H. 135; *Perkins v. R. R.* 44 N. H. 223; *Towle v. Blake*, 48 N. H. 92; *Taylor v. R. R.* 48 N. H. 304; *Stiles v. Danville*, 42 Vt. 282; *Earl v. Tupper*, 45 Vt. 275; *Com. v. McPike*, 3 Cush. 181; *Caldwell v. Murphy*, 11 N. Y. 416; *People v. Williams*, 3 Parker C. R. 84; *Baker v. Griffin*, 10 Bosw. 140; *Caldwell v. Murphy*, 1 Duer, 233; *Dabbert v. Ins. Co.* 2 Cincin. 98; *Johnson v. McKee*, 27 Mich. 471; *Gray v. McLaughlin*, 26 Iowa, 279; *State v. Glass*, 5 Oregon, 73; *Illinois R. R. v. Sutton*, 42 Ill. 438; *Looper v. Bell*, 1 Head, 373; *Johnson v. State*, 17 Ala. 618; *Phillips v. Kelly*, 29 Ala. 628; *Harriman v. Stowe*, 57 Mo. 93. See, however, *Witt v. Witt*, 3 Swab. & Tr. 143, where letters written by a patient, describing his situation to his physician, were rejected.

² *Bacon v. Charlton*, 7 Cush. 581; *Hyatt v. Adams*, 16 Mich. 180.

³ *Kennard v. Burton*, 25 Me. 39; *Bacon v. Charlton*, 7 Cush. 581; *Chapin v. Marlborough*, 9 Gray, 244; *Hunt v. People*, 3 Parker C. R. 569; *Matteson v. R. R.* 35 N. Y. 487; *Spatz v. Lyons*, 55 Barb. 476; *Gray v. McLaughlin*, 26 Iowa, 279; *Lush v. McDaniel*, 13 Ired. L. 488.

⁴ *Morrissey v. Ingham*, 111 Mass. 63.

⁵ *Barber v. Merriam*, 11 Allen, 322; *Rogers v. Crain*, 30 Tex. 289. See *Filer v. R. R.* 49 N. Y. 12. See, generally, *Rowell v. Lowell*, 11 Gray, 420; *Moody v. Sabin*, 9 Cush. 505.

⁶ *Ashland v. Marlborough*, 99 Mass. 47; though see *Rogers v. Crain*, 30 Tex. 289.

⁷ *Collins v. Waters*, 54 Ill. 485.

⁸ *R. v. Johnson*, 2 C. & Kir. 354; *R. v. Blandy*, 18 How. St. Tr. 1135.

⁹ See cases in *Wharton Cr. Law*, § 1150.

and cannot be interpreted by the witness. Of this position we have an extreme illustration in a New York case, in which, the defendant being on trial for the murder, and a witness having testified that he heard cries issuing from the house on the night of the killing, it was held that the witness could not be asked what the cries indicated.¹

§ 269. What has just been said applies to cases in which it is important to determine a party's mental condition at a particular time. We have just seen² that, for the purpose of exhibiting such condition of mind, statements made to such party by third persons may be admissible. We have now to recognize the position that, to determine such condition of mind, it is admissible to put in evidence such expressions of the party as may be shown to have been instinctive, and not to have been uttered for the purpose of producing a particular effect.³ Thus, where two persons are sued for an assault, in seizing a runaway apprentice, it is admissible, as showing the purpose, to prove that one of them told the other, at the moment of the collision, not to hurt the runaway.⁴ So in an action for enticing away a runaway servant, are the declarations of the servant at the time of leaving.⁵ So when the extent of a mental disease is in controversy, are the declarations of the person so affected,⁶ though not as to prior transactions.⁷ So when the *bona fides* of a transaction is in question are instinctive and unpremeditated declarations of parties or their agents, during the negotiations, as touching such *bona fides*.⁸ So where a married woman sets up duress and coercion to avoid a deed ex-

¹ Messner v. People, 45 N. Y. 1.

² Supra, § 254; and see supra, §§ 33-5.

³ See cases cited in last section, and see Com. v. O'Connor, 11 Gray, 94; Howe v. Howe, 99 Mass. 88; Goodwin v. Harrison, 1 Root, 80; Kearney v. Farrell, 28 Conn. 317; Roach v. Lehring, 59 Penn. St. 74; Knowlton v. Clark, 25 Ind. 395; Williams v. Jarrot, 1 Gilman, 120; Welsh v. Louis, 31 Ill. 446; Ill. Cent. R. R. v. Sutton, 42 Ill. 438; Buttram v. Jackson, 32 Ga. 409; Edgar v. Mc-

Arn, 22 Ala. 796; Liles v. State, 30 Ala. 24; State v. Hays, 22 La. An. 39; People v. Shea, 8 Cal. 538. See Whart. Cr. Law, 7th ed. 50 a.

⁴ Williams v. Jarrot, 1 Gilman, 120.

⁵ Hadley v. Carter, 8 N. H. 40.

⁶ 1 Whart. & St. Med. Jur. § 286 (3d ed.); Whart. Cr. Law (7th ed.), 50 a; Howe v. Howe, 99 Mass. 88; Ill. Cent. R. R. v. Sutton, 42 Ill. 438.

⁷ Stewart v. Redditt, 3 Md. 67.

⁸ Banfield v. Parker, 36 N. H. 353; Zabriskie v. Smith, 13 N. Y. 322. See supra, § 35.

executed by her, she may prove her husband's threats and her consequent terror.¹ On the same principle, in actions for adultery, what the husband and wife had said to each other, or letters written by either party to the other, when there was no ground to suspect collusion, were received in evidence to show the terms on which they lived.² In life insurance cases the party's views as to his condition may be thus shown. Thus in an English action on a policy of insurance,³ the defendants offered evidence that, a few days after it was made, the deceased, who had previously represented herself to the defendants as being in good health, had given a totally different account of her health to a witness. It was held that the witness might relate her conversation with the deceased; and that the statements of the latter, as so related, would be evidence in the same way as the answers of patients to the inquiries of their medical attendants are evidence as to their state of health.⁴

¹ *Central Bank v. Copeland*, 18 Md. 305.

² *Aveson v. Kinnard*, 6 East, 188.

³ *Witt v. Klindworth*, 3 S. & T. 143. See fully *supra*, §§ 33-35.

⁴ *Trelawney v. Coleman*, 1 B. & Ald. 90; cf. *Willis v. Bernard*, 8 Bing. 376. *Supra*, §§ 34, 35.

BOOK II.

MODE OF RECEIVING PROOF.

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I. GENERAL RULES.

§ 276. As a general rule, a court in making up its conclusions is to take no notice of facts not in evidence. In the Roman law this maxim, as held by the classical jurists, is understood as precluding the *judex* from allowing his judgment to be influenced by any facts which are the proper objects of evidence, but which were not put in evidence.¹ In the same sense this maxim has been accepted by our own courts.²

Court to
take no
notice of
evidential
facts not in
evidence.

§ 277. Certain facts, or conclusions from facts, however, may be noticed, which may be styled *non-evidential*, from the fact that they are not the proper objects of evidence, and that consequently they may be judicially noticed by the courts. These facts will be presently considered.

Non-evi-
dential
facts may
be judicial-
ly noticed.

§ 278. Reason is to be treated as a coördinate factor with evidence. The adjudicating tribunal must determine, (1.) whether a particular fact really is evidence; (2.) what it is to be interpreted as meaning;³ (3.) how far it is to be modified by other testimony in the case;

Reason a
co rdinate
factor
with evi-
dence.

¹ See Endemann's *Beweislehre*, Ala. 331. See particularly supra, § 21.

² *Mayor of Beverley v. Atty. Gen.* 6 H. of L. Cas. 333; *Bradstreet v. Potter*, 16 Pet. 317; *Mills v. Brown*, 16 Pet. 525; *Bell v. Bruen*, 1 Howard, 169; *Providence v. Babcock*, 3 Wall. 240; *Wheeler v. Webster*, 1 E. D. Smith (N. Y.), 1; *Anderson v. R.* 54 N. Y. 331; *Bain v. Wilson*, 10 Oh. St. 18; *Odom v. Shackleford*, 44

³ Of this duty one of the most striking illustrations is the right to interpret words. See *R. v. Woodward*, 1 Moo. C. C. 323, and cases cited in *Wh. Cr. Law*, § 377; *Clementi v. Golding*, 2 Camp. 25; *Shubrick v. State*, 2 S. C. 21; *State v. Abbott*, 20 Vt. 537; *Com. v. Kneeland*, 20 Pick. 229.

(4.) how far it is to be modified by natural and other phenomena of which, as we will hereafter see, the court is bound to take notice.¹

§ 279. The policy of scholastic jurisprudence was to treat the judge as a mere automaton, destitute of any prior knowledge whether legal or lay, his sole office being to determine whether or no the case in court comes up to a hypothetical case laid down in the books. By the glossators and post-glossators, copious commentaries were prepared, in which a positive legal character was assigned to every case which they could imagine. In the framing of such cases, in fact, the canonists, who were trained in the casuistical studies requisite for a proper use of the confessional, were peculiarly skilled; and few things, in the literature of those days, are so remarkable as the extraordinary and

¹ See this developed by Hooker, when discussing the analogical relations of reason and revelation.

"If only those things be necessary, as surely none else are, without the knowledge and practice whereof it is not the will and pleasure of God to make any ordinary grant of salvation; it may be notwithstanding, and oftentimes hath been demanded, how the books of Holy Scripture contain in them all things necessary, when of things necessary the very chief is to know what books we are bound to esteem holy, which point is confessed impossible for the scripture itself to teach. Whereunto we may answer with truth, that there is not in the world any art or science, which, proposing unto itself an end (as every one doth some end or other), hath been therefore thought defective, if it have not delivered simply whatsoever is needful to the same end; but all kinds of knowledge have their certain bounds and limits; each of them presupposeth many necessary things learned in other sciences and known beforehand. He that should take upon him to teach men how to be

eloquent in pleading causes, must needs deliver unto them whatsoever precepts are requisite unto that end; otherwise he doth not the thing which he taketh upon him. Seeing, then, no man can plead eloquently unless he be able first to speak, it followeth that ability of speech is in this case a thing most necessary. Notwithstanding every man would think it ridiculous, that he which undertaketh, by writing, to instruct an orator, should therefore deliver all the precepts of grammar, because his profession is to deliver precepts necessary unto eloquent speech, yet so that they which are to receive them be taught beforehand so much of that which is thereunto necessary, as comprehendeth the skill of speaking." "It sufficeth, therefore, that nature and scripture do serve in such full sort, that they both jointly, and not severally either of them, be so complete, that unto everlasting felicity we need not the knowledge of anything more than these two may easily furnish our minds with on all sides." Hooker's Ecclesiast. Pol. Book I. ch. xiv.

sometimes abnormal combinations of contingencies which they devised. Those combinations were intended to anticipate every future event; to each combination a certain legal judgment was assigned; and when a new case did not exactly reproduce one of these norms, then such new case was to be ruled by the law of the norm that was nearest. Nothing was to be left to the convictions of the judge; there was no appeal to his learning or experience; everything was to be determined by the law adjudicating the particular case in advance. “*Quamvis falsum probatur, probatio esse non desinit, ut recta sit probatio, satis est, ut in forma non peccet, licet in materia deficiat.*”¹ The judge had nothing to do with the distinctive merits of the case. He was to determine solely *secundum allegata et probata*; the *allegata* consisting only of the points to which a subtle system of special pleading narrowed the issue; the *probata* frequently only of arbitrary legal assumptions, a few relics of which have come down to us under the titles of presumptions of law. The use, by the judge, of reason in the application of law to fact was considered as monstrous, as was the use of reason by the individual in the interpretation of the dogmas of the church. The judge was required to take that decision, given by the casuists, which best fitted his case; to seek for a decision which the justice of the case might distinctively demand, was not within his power. He was not to act *propria conscientia*, except when as *papa et imperator, superiorem iudicem non recognovit*.²

§ 280. So far as concerns law, this is well enough, as an inferior judge must be bound by what is the settled law. But as far as concerns the value to be attached to evidence, the practice worked great injustice. Certain kinds of evidence had assigned to them certain effective valuations; and when such evidence was introduced, these valuations were to rule the case, no matter what might be the merits. And as almost every item of evidence after a while had thus attached to it a peremptory probative force, scarcely a case could arise in which, even when the issue was fairly presented, it could be fairly tried. No doubt in many cases right results were reached, but this was by wrong processes.

¹ Masc. qu. 2, nr. 13.

² See citations to this point in Endemann's *Beweislehre*, 27.

A will made under the influence of a child, for instance, would *primâ facie* be ruled void, for the reason that it is a presumption of law that a will made under the influence of another is not the testator's free act. It would not be within the judge's power to go into the merits of the case, and to inquire whether the influence exerted was such as really destroyed the testator's moral freedom. When witnesses differed, preponderance in number was to decide; and consequently the *juxta*, on a question of fact, had to rule in favor of three whom he knew spoke falsely, against two whom he knew spoke truly. So it was that by a series of rules, first determining competency, and then credibility, the scholastic jurists decided in advance not only what witnesses were competent, but to what extent each was to be believed. The last of these restrictions (those determining credibility) the English common law never received. The first (those excluding persons interested) we have now by statute removed.

§ 281. Whether a judge can, on his own motion, put to a witness questions independently of counsel, so as to bring out points counsel either designedly or undesignedly overlook, is much disputed by modern commentators on the Roman law. On the one side it is urged, in conformity with the scholastic view, that the judge is confined to the proof adduced by the parties. On the other side it is insisted that it is absurd for a judge, with a witness before him, not to do what he can to elicit the truth. So far as concerns the abstract principle, writers on the English common law repeatedly affirm the scholastic view that the judge must form his judgment exclusively on the proofs brought forward by the parties. So far as concerns the practice, judges, both in England and in the United States, do not hesitate to interrogate a witness at their own discretion, eliciting any facts they deem important to the case. For this purpose not only may a witness be recalled by the judge,¹ but new facts may be brought out by the judge's personal interposition.²

¹ *R. v. Watson*, 6 C. & P. 653; *Middleton v. Barned*, 4 Exch. R. 243; *Com. v. Galavan*, 9 Allen, 271; *Epps v. State*, 19 Ga. 102. *Infra*, § 496.

² See a curious illustration of this by Sir John Jervis, given *infra*, § 347, note.

§ 282. It will be presently noticed that the judge not only may, but should, have recourse, in making up his opinion of the law of the case, to the literature of his profession even in matters not referred to by counsel; though if he make any new point, it is proper for him to state it to counsel, so as to open it to their criticism. But he is not limited in his researches to legal literature.¹ He may consult works on collateral sciences or arts, touching the topic on trial.² He may draw, for instance, on mythology, in order to determine the meaning of similes in an ambiguous writing.³ He may refer to almanacs;⁴ he may appeal to his own memory, for the meaning of a word in the vernacular;⁵ he may, as to the meaning of terms, refer to dictionaries of science of all classes;⁶ he may determine the meaning of abbreviations of Christian names and offices, and of other common terms;⁷ as to a point of political history (*e. g.* the recognition of a foreign government) he may consult the executive department of the state;⁸ he may cause inquiry to be made as to the practice of other courts;⁹ and Lord Hardwicke went so far as to inquire of an eminent conveyancer as to a rule of conveyancing practice.¹⁰ And so the court may have recourse to the legislative rolls to determine the construction of a statute.¹¹

Judge may consult other than legal literature.

§ 283. While it is the duty of the parties to bring before the

¹ See *Willoughby v. Willoughby*, 1 T. R. 772; *U. S. v. Teschmaker*, 22 How. 392; and *infra*, § 335.

² As illustrating this, see rulings on insanity, cited in *Whart. & St. Med. Juris.* §§ 108, 303; and also *infra*, § 665.

³ *Hoare v. Silverlock*, 11 Ad. & El. N. S. 624.

⁴ *Page v. Faucet*, Cro. El. 227; *Sutton v. Darke*, 5 H. & N. 649; *Allman v. Owen*, 31 Ala. 167; *Sprowl v. Lawrence*, 33 Ala. 674.

⁵ *R. v. Woodward*, 1 Mood. C. C. 323; *Clementi v. Golding*, 2 Camp. 25; *Moufflet v. Cole*, L. R. 7 Exch. 70; *Com. v. Kneeland*, 20 Pick. 229; though see as to local or class idioms, *Bodmin Mines Co.* 23 Beav. 370.

⁶ *Clementi v. Golding*, 2 Camp. 25. As an illustration of this, see *Brown v. Piper*, *infra*, § 335.

⁷ *Stephen v. State*, 11 Ga. 225; *Moseley v. Mastin*, 37 Ala. 216; though see *Russell v. Martin*, 15 Tex. 238; *Weaver v. McElhenon*, 13 Mo. 89.

⁸ *Taylor v. Barclay*, 2 Sim. 221.

⁹ *Doe v. Lloyd*, 1 M. & Gr. 685, relying on *Worsley v. Fillis-ker*, 2 Roll. R. 119; and see *Chandler v. Grieves*, 2 H. Bl. 606, n. a, where the common pleas directed an inquiry of the admiralty court as to a point of admiralty law.

¹⁰ *Willoughby v. Willoughby*, 1 T. R. 772.

¹¹ *R. v. Jeffries*, 1 Str. 2146; *Spring v. Eve*, 2 Moo. 240. *Infra*, § 295.

court the law on which they rely, the court is bound to verify their statements, and to determine on its own responsibility what the law really is. Even points of law omitted by counsel may be taken up by the court. Thus judges have repeatedly refused to try frivolous wagers;¹ and in one notorious instance, Lord Loughborough, against the protest of both parties, refused to try a wager as to a game of cards.² And a judge will dismiss an action on a transaction violating the revenue laws, though the point be not taken by the defence.³ So a judge may of his own motion prevent the disclosure of confidential professional communications.⁴ The classical Roman law (as distinguished from the scholastic) has emphatic injunctions to this effect. “Non dubitandum est, iudicem, si quid a litigatoribus vel ab his, qui negotiis adsistunt, minus fuerit dictum, id supplere, et proferre, quod sciet legibus et juri publico convenire.”⁵ Yet this is on the supposition that the point to be decided is one of principle, submitted as such by the parties, on which the judgment of the court is invoked; and even in such case, it is proper for a judge, before deciding the case on the special points supplied by himself, to state such points to counsel, and call for a reargument if desired. But giving this prerogative its widest range, it is held not to justify a judge in interposing of his own motion technical objections, which interfere with a decision of the case on the merits, and which a party may intentionally decline to invoke. “Non quidquid iudicis potestati permittitur, id subicitur juris necessitati.”⁶ In such cases, that which is in this respect within the judge’s power is not laid on him as a necessity of law.

§ 284. So far as concerns the revealed law of God, the courts take judicial notice of Holy Scriptures in three distinct relations. First, certain portions of the Bible are adopted as a normal rule by the ecclesiastical law, which, in the United States, lies at the base of our common law of marriage. Secondly, Christianity in its general incidents, has been declared

¹ See *Da Costa v. Jones*, 2 Cowp. 729; *Ditchburn v. Goldsmith*, 4 Camp. 152; *Brown v. Leeson*, 2 H. Black. 43.

² See *Campbell’s Life of Lord Loughborough*, *passim*.

³ *Kessel v. Albetis*, 56 Barb. 362.

⁴ See *infra*, § 538; *People v. Atkinson*, 40 Cal. 284.

⁵ L. xi. C. ut desunt Advocat. Weber, Heffter’s ed. 20.

⁶ L. 40, pr. D. de iudiciis.

to be part of the common law of the land ; a proposition which, with its due qualification, it is not intended here to discuss, but which presupposes an acquaintance by the courts with the authoritative records of Christianity.¹ Thirdly, Christianity in its ethical relations, is, apart from its divine authority, a constituent element in modern ethics, of whose laws the courts are supposed to be judicially cognizant. In addition to the revealed laws of God, we must also assume the knowledge by the court of His natural laws, such as are ordinarily admitted by experience, or demonstrated by science.²

§ 285. The law of nations, being coextensive with civilization, must also be judicially noticed. This has been extended to include the English rules of navigation adopted by orders in council, of January 9, 1863 (prescribing the sorts of lights to be used on British vessels), and by our Act of Congress of 1864; these rules having, before the close of the year 1864, been accepted as obligatory by more than thirty of the principal commercial states of the world, including most of those having any shipping on the Atlantic Ocean.³

And so of
law of
nations.

§ 286. So, on the same principle, each court is bound to take judicial notice of the domestic laws to which it is subject. As component parts of such we may notice the common law ; and the statute law, both as to its character and the time when it goes into operation.⁴

And so of
domestic
laws.

II. CODES AND THEIR PROOF.

§ 287. An ordinance or statute of the United States is not "foreign," so far as concerns the particular states. Hence it has been held, that a state court will take judicial notice of the federal Constitution and its amend-

Federal
laws not
foreign to
the states;

¹ See Whart. Cr. Law, §§ 2536-47, Md. 138 ; State v. Jarrett, 17 Md. 309 ; Springfield v. Worcester, 2

² *Infra*, § 355. Cush. 52 ; State v. Bailey, 16 Ind.

³ The Scotia, 14 Wallace, 171. 46 ; Pierson v. Baird, 2 Greene (Ia.),

⁴ Cassiday v. Stewart, 2 M. & G. 235 ; Berliner v. Waterloo, 14 Wise. 457 ; Sims v. Maryett, 17 Q. B. 292 ; 378 ; Howard Co. in re, 15 Kans. R. v. Sutton, 4 M. & S. 542 ; Wason 194 ; Dolph v. Barney, 5 Oregon, v. Walter, 8 B. & S. 671 ; S. C. L. 191 ; State v. O'Conner, 13 La. An. R. 4 Q. B. 73 ; Marbury v. Madison, 486. The federal courts take judicial notice of the sessions of the state courts. Cheever v. Wilson, 9 M'Lean, 521 ; Canal Co. v. R. R. 4 Gill & J. 1 ; Hammond v. Inloes, 4 Wall. 108.

nor the state laws to the federal courts. ments;¹ and of federal public statutes.² And it has been held that a state court will recognize without proof state statutes incorporated in acts of Congress.³ The state courts, under this rule, take cognizance of federal statutes; and the federal courts take cognizance of state statutes.⁴

§ 288. So far, however, as concerns the international relations of the states of the American Union, since these states, under the Constitution of the United States, are foreign to each other in all cases except those in which the federal Constitution or separate compact provides otherwise; it follows that the courts of one state will not take judicial notice of the statutes of another state. If such statutes are different from the domestic law, they must be proved.⁵ At the same time, when the courts of one state recog-

¹ *Graves v. Keaton*, 3 Coldw. 8.

² *Kessel v. Albetis*, 56 Barb. 362; *Bayly v. Chubb*, 16 Grat. 284; *Dickenson v. Breeden*, 30 Ill. 279; *Semple v. Hagar*, 27 Cal. 163; *Morris v. Davidson*, 49 Ga. 361; *Papin v. Ryan*, 32 Mo. 21; *Rice's Succession*, 21 La. An. 614; *Wright v. Hawkins*, 28 Tex. 452; *Mims v. Swartz*, 37 Tex. 13.

³ *Flanigen v. Ins. Co.* 7 Penn. St. 306.

⁴ *Course v. Stead*, 4 Dal. 27 n.; *Owings v. Hull*, 9 Peters, 607; *Pennington v. Gibson*, 16 How. 65; *Cheever v. Wilson*, 9 Wall. 108; *Griffing v. Gibb*, 2 Blatch. 519; *Gordon v. Hobart*, 2 Sum. 402; *Jones v. Hays*, 4 McL. 521; *Mewster v. Spalding*, 6 McL. 24; *Merrill v. Dawson*, Hemp. 563.

⁵ *Territt v. Woodruff*, 19 Vt. 182; *Taylor v. Boardman*, 25 Vt. 581; *Hempstead v. Reed*, 6 Conn. 480; *Chanoine v. Fowler*, 3 Wend. 173; *Hosford v. Nichols*, 1 Paige, 220; *Miller v. Avery*, 2 Barb. Ch. 582; *Van Buskirk v. Mulock*, 3 Harris. (N. J.) 184; *Ripple v. Ripple*, 1 Rawle, 386;

State v. Hinchman, 27 Penn. St. 479; *Baily v. McDowell*, 2 Harring. (Del.) 34; *Irwing v. McLean*, 4 Blackf. 52; *Billingsley v. Dean*, 11 Ind. 331; *Johnson v. Chambers*, 12 Ind. 112; *Davis v. Rogers*, 14 Ind. 424; *Mason v. Wash*, 1 Breese, 16; *Carey v. R. R.* 5 Iowa, 357; *Taylor v. Runyan*, 9 Iowa, 522; *Rape v. Heaton*, 9 Wise. 328; *Brimhall v. Van Campen*, 8 Minn. 13; *Hoyt v. McNeil*, 13 Minn. 390; *Beauchamp v. Mudd*, Hard. (Ky.) 163; *Cook v. Wilson*, 1 Litt. Cas. (Ky.) 437; *Dorsey v. Dorsey*, 5 J. Marsh. 280; *Stephenson v. Bannister*, 3 Bibb, 369; *State v. Twitty*, 2 Hawks, 248; *Whitesides v. Poole*, 9 Rich. S. C. 68; *Stanford v. Pruet*, 27 Ga. 243; *Simms v. Ex. Co.* 38 Ga. 129; *Drake v. Glover*, 30 Ala. 382; *Mobile R. R. v. Whitney*, 39 Ala. 468; *Anderson v. Folger*, 11 La. An. 269; *Hemphill v. Bank*, 6 Sm. & M. 44; *Jones v. Laney*, 2 Tex. 342; *Anderson v. Anderson*, 23 Tex. 639; *Newton v. Cocks*, 10 Ark. 169. See, however, *Foster v. Taylor*, 2 Overt. 191; *Herschfeld v. Dixel*, 12 Ga. 582; *Butcher v. Brownsville*, 2 Kans. 70.

nize the statute of another state as law in such state, this recognition may be permanently maintained by the courts of the former state, until there is proof of the change of such statute.¹ And it has been held by the supreme court of the United States that when the laws of one state recognize official acts done in pursuance of the laws of another state, the courts of the former state may take judicial cognizance of the laws of the latter state, so far as it is necessary to determine the validity of the acts done in conformity with such laws.²

§ 289. In the federal courts, the statutes of the several states of the American Union may be read from the official printed volume, with the seal or other authentication of the state, without further proof, as *primâ facie* authentic,³ and in some states this is permitted at common law,⁴ in others by statute.⁵ At common law, however, and in strict practice, such statute should be certified either by the secretary of state, or by the clerk of a supreme judicial court, with a certificate of the governor of the state as to the official capacity of the secretary or clerk.⁶

State laws may be proved from printed volume.

§ 290. To a judicial notice of domestic statutes it is a prerequisite that the court should determine what statutes are in force. For this purpose the court may refer to the authentic records of the proceedings of the legisla-

Court may determine as to whether

¹ *Graham v. Williams*, 21 La. An. 594.

² *Carpenter v. Dexter*, 8 Wall. 513.

³ *Craig v. Brown*, Pet. C. C. 352; *Hinde v. Vattier*, 5 Pet. 398; *Owings v. Hull*, 9 Pet. 607; *Pease v. Peck*, 18 How. U. S. 595. See *Commere. Bk. v. Patterson*, 2 Cranch, 346.

⁴ *Emery v. Berry*, 26 N. H. (8 Foster) 486; *State v. Abbott*, 29 Vt. 60; *Mullen v. Morris*, 2 Penn. St. 85; *Hunter v. Fulcher*, 5 Rand. Va. 126; *Wilson v. Lazier*, 11 Grat. 477; *Barkman v. Hopkins*, 11 Ark. (6 English) 157; *Charlesworth v. Williams*, 16 Ill. 338; *Com. Ins. Co. v. Labuzan*, 15 La. An. 295; *Stewart v. Swanzy*, 23 Miss. 502.

⁵ *Merrifield v. Robbins*, 8 Gray,

150; *Cutler v. Wright*, 22 N. Y. 472; *Toulandou v. Lachenmeyer*, 6 Abb. Pr. N. S. 215; *Heberd v. Myers*, 5 Ind. 94; *Crake v. Crake*, 18 Ind. 156; *Paine v. Lake Erie*, 31 Ind. 283; *Latterett v. Cook*, 1 Iowa, 1; *State v. Check*, 13 Ired. L. 114; *Hanrick v. Andrews*, 9 Port. (Ala.) 9; *Bright v. White*, 8 Mo. 421; *Biesenthall v. Williams*, 1 Duvall, 329. That the seal of the state is a sufficient authentication, see *U. S. v. Johns*, 4 Dall. 412; *Robinson v. Gilman*, 10 Me. 299; *State v. Carr*, 5 N. H. 367.

⁶ *U. S. v. Johns*, 4 Dall. 412; *Robinson v. Gilman*, 10 Me. 299; *State v. Carr*, 5 N. H. 367; *Ricc's Succession*, 21 La. An. 614.

statute has been actually and constitutionally passed.

ture.¹ Has a bill, for instance, received a constitutional majority? Has it been passed over the governor's veto? Did it pass in a constitutional shape? Does it, for instance, as is required by the constitutions of several states, relate to but one subject, which is expressed in the title? Questions of this kind are vital when a court has to determine whether a statute exists; but questions of this kind cannot be solved without resort to the records of the legislature. It is for the court, with such aid, to determine whether the statute in dispute has passed. For this purpose the original record is the best evidence, unless the printed journals be made so by statute.² It is scarcely necessary to say that a statute duly certified is presumed to have been duly passed until the contrary appear.³ It has been stated above that it is within the province

¹ See Sedgwick on Statutory Law, 2d ed. 55.

² Sedgwick's Statu. Law, 2d ed. 55; Cooley's Const. Lim. 135; Gardner v. Collector, 6 Wall. 499; Opinion of Judges, 35 N. H. 579; Opinion of Justices, 52 N. H. 622; Thomas v. Dakin, 23 Wend. 9; Warner v. Beers, 23 Wend. 103; People v. Purdy, 2 Hill, 31; Purdy v. People, 4 Hill, 384; Commercial Bank v. Sparrow, 2 Denio, 97; People v. Briggs, 50 N. Y. 553; People v. Board, 52 N. Y. 556; People v. Commissioners, 54 N. Y. 276; Harris v. People, 59 N. Y. 599; Com. v. Dickinson, 9 Phil. (Pa.) 561; Osburn v. Staley, 5 W. Va. 85; Fordyce v. Godman, 20 Oh. (N. S.) 1; People v. Mahoney, 13 Mich. 481; People v. Hurlburt, 24 Mich. 55. See, also, infra, § 295; Turley v. Logan, 17 Ill. 151; Prescott v. Canal, 19 Ill. 324; Holcomb v. Davis, 56 Ill. 413; People v. De Wolf, 62 Ill. 253; State v. Young, 47 Ind. 150; Williams v. State, 48 Ind. 306; Clare v. State, 5 Iowa, 509; State v. Dousman, 28 Wisc. 541; State v. Platt, 2 Rich. (N. S.) 150; Morton v. Comptroller, 4 S. C. 430; Allen v. Tison, 50 Ga. 374; Conner, ex parte, 51 Ga.

571; Moody v. State, 48 Ala. 115; Walker v. State, 49 Ala. 429; Bledsoe v. State, 5 Miss. 13; Smith v. Com. 8 Bush, 108; Hind v. Rice, 10 Bush, 528; Logan v. State, 3 Heisk. 442; Burr v. Ross, 19 Ark. 250; Martin v. Francis, 13 Kans. 220; Antonio v. Gould, 34 Tex. 49; State v. Shadle, 41 Tex. 404; State v. McCracken, 42 Tex. 383. Infra, § 296.

³ People v. Highways, 54 N. Y. 276; Hensoldt v. Petersburg, 63 Ill. 157. See, also, as to admissibility of legislative journals, infra, § 637.

"When it is necessary to inquire by what vote a law was passed, the judges are to determine from the printed statutes, or from the laws on file in the secretary of state's office, whether the requisite vote was received. Upon such an inquiry the printed volume is presumptively correct, and the original act is conclusive. See chap. 306, Laws of 1842. How such a question was to be investigated was much considered in the earlier cases arising under the Free Banking Act of 1838; and the discussions which then took place led the way to the subsequent determination of the courts that it belonged to the

of a court to determine whether a statute conforms to a constitutional limitation, requiring that no statute shall be operative whose title does not give notice of its contents. Ordinarily, however, it is enough if the title, under such a limitation, gives such notice of the subject matter of the statute as to lead to an examination of its clauses.¹ A court cannot resort to the leg-

functions of the judges to investigate for themselves and to declare what is the law, whether common or statute. *People v. Purdy*, 2 Hill, 31 ; *S. C.* in error, 4 Hill, 384 ; *De Bow v. The People*, 1 Den. 9 ; *Commercial Bank v. Sparrow*, 2 Den. 97 ; *People v. Devlin*, 33 N. Y. 269. The law in question does not appear either upon the printed statute book or upon the original act to have been passed by a two third vote, and consequently it never had the effect of law." *Johnson, C., People ex rel. Purdy v. Com'rs of Highways of Marlborough*, 54 N. Y. 279.

As qualifying above, see *Eld v. Gorham*, 20 Conn. 8 ; *Pangborn v. Young*, 32 N. J. L. 29 ; *Speer v. Plank Road*, 22 Penn. St. 376 ; *Duncombe v. Prindle*, 12 Iowa, 1 ; *Green v. Weller*, 32 Miss. 650.

In *R. v. Knollys, Ltd.* Raym. 10, the court declined to take judicial notice of parliamentary journals.

¹ In *Mauch Chunk v. McGee*, decided in the supreme court of Pennsylvania, in March, 1876 (*Weekly Notes of Cases*, Oct. 19, 1876), *Agnew, C. J.*, in delivering the opinion of the court, thus speaks: "It is settled in this state that a part of an act not within the subject stated in the title may be declared to be unconstitutional, leaving the portion within the title to stand. *Dorsey's Appeal*, 22 P. F. Smith, 192 ; *Allegheny Home's Appeal*, 27 P. F. Smith, 77 ; *Smith v. McCarthy*, 6 P. F. Smith, 359 ; *Com'th v. Green*, 8 P. F. Smith, 234 ; *Cooley's Constitutional Limitations*, 178. The

first section is conceded to be constitutional. The real question then is, whether the second section is germane to the same subject, giving to the second section the interpretation it may reasonably have. We think it falls within the general subject of the title. It is the duty of the court to reconcile the different parts of a law, if it can be reasonably done, rather than to declare any part void, and thus frustrate the legislative action. . . .

"Upon the whole section we cannot, in view of its evident purpose, say it is not substantially germane to the subject of the title. It will not do to defeat useful and honest legislation by too rigid an adherence to the letter of the constitution. As remarked by *C. J. Gibson*, following *C. J. Tilghman*, a constitution is not to be interpreted as articles of agreement at common law ; and where multitudes are to be affected by the construction of an instrument, great regard should be paid to the spirit and intention. *Monon. Nav. Co. v. Coons*, 6 W. & S. 114. 'It is a cardinal rule,' said the late *C. J. Thompson*, 'that all statutes are to be construed so as to sustain rather than ignore them; to give them operation, if the language will permit, instead of treating them as meaningless,' and, I may add, or treating them as invalid. *Howard's Appeal*, 20 P. F. Smith, 344. It is not the purpose or the duty of the court to catch at pretexts to avoid legislation, when it can be fairly reconciled with the constitution. This

islative rolls and records for the purpose of examining as to whether the bill as passed is the same as the bill certified,¹ nor for the purpose of determining whether the statute passed in conformity with the rules adopted by the legislature for its own government.² Nor is extrinsic evidence admissible to show that an act printed in the official volume and certified to by the proper officer of state, varies from the law actually passed.³

§ 291. The courts of a state which has been carved out of another state take judicial notice of the statutes of the latter state prior to the separation.⁴ On the same principle our courts will take judicial notice of the statutes of Great Britain enacted prior to the separation;⁵ the states ceded by Spain will recognize the Spanish law as existing prior to the cession;⁶ and, generally, the laws of a prior will be judicially noticed by the courts of a subsequent sovereign.⁷

§ 292. By the Roman law, the judge is not bound to take

has been the current of decision in this state in many cases. *Blood v. Mercelliott*, 3 P. F. Smith, 391; *Case of Church St.* 4 P. F. Smith, 353; *Com'th v. Green*, 8 P. F. Smith, 226; *Allegheny Home's Appeal*, 27 P. F. Smith, 77; *State Line v. Juniata P. R. Co.* App. Ibid. 429. In *The Commonwealth v. Green*, Justice Sharswood remarked that the intention of the constitutional amendment was to require that the real purpose of a bill should not be disguised or covered by the general words 'and for other purposes,' which was formerly so common, but should be fairly stated; and it must be a clear case to justify a court in pronouncing an act, or any part of it, void on this ground. So it was said in *Allegheny Home's Appeal*, 'If the title fairly gives notice of the subject of the act so as reasonably to lead to an inquiry into the body of the bill, it is all that is necessary.' An exception to this general rule is when the title tends to *mislead*, and to draw off intention from a covert purpose

contained in the body of the bill. Such was the case of the *Union Pass. Railway Co.'s Appeal* (29 *Legal Intelligencer*, 1872, p. 380). The case before us has no such features. We think the court below erred in holding the second section of the act to be unconstitutional."

¹ *Pangborn v. Young*, 32 N. J. L. 29; *Coleman v. Dobbins*, 8 Ind. 156; *Grob v. Cushman*, 45 Ind. 119; *Green v. Weller*, 32 Miss. 650.

² *Coleman v. Dobbins*, 8 Ind. 156; *Grob v. Cushman*, 45 Ind. 119.

³ *Annapolis v. Harwood*, 32 Md. 371.

⁴ *Delano v. Jopling*, 1 Litt. (Ky.) 417.

⁵ *Ocean Ins. Co. v. Fields*, 2 Story, 59.

⁶ *U. S. v. Turner*, 1 How. 663; *Fremont v. U. S.* 17 How. 542; *Doe v. Eslava*, 11 Ala. 1028; *Chouteau v. Pierre*, 9 Mo. 3; *Ott v. Soulard*, 9 Mo. 581.

⁷ *Stokes v. Maeken*, 62 Barb. 145; *Prell v. McDonald*, 7 Kans. 426.

notice of private statutes granting special privileges to individuals; nor of local customs warranting such privileges. In such cases comes up the question of fact, whether the law establishes such privileges. This fact must, by the Roman law, be proved as is any other fact; though when proved, the applicability of the law so accepted remains with the court, acting on the whole evidence in the case.¹ In England, by the Documentary Evidence Act (adopted in 1845), "all copies of private and local and personal acts of parliament not public acts, if purporting to be printed by the queen's printers, and all copies of the journals of either house of parliament, &c., shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed."² By Anglo-American common law, private statutes must be proved on trial.³ As to what distinguishes private from public statutes, however, questions have arisen which remain to be discussed.⁴

Private laws not noticed by court.

§ 293. As public statutes have been regarded statutes relative to particular public officers;⁵ statutes establishing or defining municipal corporations;⁶ statutes in respect to roads in general;⁷ statutes in respect to navigation in general;⁸ statutes regulating the sale of liquor;⁹ statutes giving jurisdiction to a particular court;¹⁰ and statutes affecting all classes of persons in the state.¹¹ Municipal ordinances are private laws when brought before the superior judi-

Distinction between private and public laws.

¹ Mühlenbrnch, Doct. Pandect, § Mon. 68; *Bevens v. Baxter*, 23 Ark. 39, notes 8, 9, ca. 3; *Weber, Heffter's* ed. 17.

² See Taylor's Ev. § 7.

³ *Leland v. Wilkinson*, 6 Peters, 317; *Soc. Prop. Gospel v. Young*, 2 N. H. 310; *Pearl v. Allen*, 2 Tyler (Vt.), 315; *Alleghany v. Nelson*, 25 Penn. St. 332; *State v. Jarrett*, 17 Md. 309; *Legrand v. College*, 5 Munf. 329; *Ellis v. Eastman*, 32 Cal. 447; *Atchison R. R. v. Blackshire*, 10 Kans. 477.

⁴ See *Somerville v. Wimbish*, 7 Grat. 205; *Collier v. Baptist Soc.* 8 B.

Mon. 68; *Bevens v. Baxter*, 23 Ark. 387.

⁵ *Bretz v. Mayor*, 6 Roberts (N. Y.), 325; *State v. Jarrett*, 17 Md. 309; *State v. Delesdenier*, 7 Tex. 76.

⁶ *Ross v. Reddick*, 1 Scammon, 73; *Fauntleroy v. Hannibal*, 1 Dill. 118; *Prell v. McDonald*, 7 Kans. 426.

⁷ *Griswold v. Gallop*, 32 Conn. 208.

⁸ *Hammond v. Inboes*, 4 Md. 138.

⁹ *Levy v. State*, 6 Ind. 281.

¹⁰ *Bretz v. Mayor*, 6 Roberts (N. Y.), 325.

¹¹ *Levy v. State*, 6 Ind. 281.

ciary of a state,¹ but not when brought before a city court.² So the laws of a school board are private laws.³

§ 294. The legislature may directly or by implication require that certain statutes shall be regarded by the courts as public.⁴ Much diversity of opinion exists as to whether statutes incorporating companies for banking, railroad, or manufacturing purposes, are public or private statutes. It has been sometimes held that such statutes are private statutes, which must be averred and proved.⁵ On the other hand, it may be properly argued that a grant of sovereignty is always a public act; interesting as well those (the remaining portion of the community) whose rights are thereby contracted, as those (the persons receiving the franchise) whose rights are thereby enlarged.⁶ Charters, however, not involving any diminution of rights to the body of citizens, or granted by subordinate bodies in pursuance of general laws, require to be proved.⁷

¹ *Garvin v. Wells*, 8 Iowa, 286; *State v. Jarrett*, 17 Md. 309; *Somerville v. Wimbish*, 7 Grat. 205; *Case v. Mobile*, 30 Ala. 538; *Hazzard v. Municipality*, 7 La. An. 495; *Mooney v. Kennett*, 19 Mo. 551.

² *State v. Leiber*, 11 Iowa, 407.

³ *Boyers v. Pratt*, 1 Humph. 90.

⁴ *Baring v. Harmon*, 13 Me. 361; *Hawthorne v. Hoboken*, 32 New J. L. 172; *Cicero Draining Co. v. Craighead*, 28 Ind. 274; *Bowie v. Kansas City*, 51 Mo. 554; *Hart v. R. R.* 6 W. Va. 336; *Walker v. Armstrong*, 2 Kans. 198.

⁵ *Soe. Prop. Gospel v. Young*, 2 N. H. 310; *Pedicaris v. Road Co.* 29 N. J. L. 367; *Bank v. Wollaston*, 3 Harr. (Del.) 90; *Carrow v. Bridge Co. Phill. N. C. L.* 118; *City Council v. Plank Road*, 31 Ala. 76; *Drake v. Flewellen*, 33 Ala. 106; *King v. Doolittle*, 1 Head (Tenn.), 77.

⁶ *Beatty v. Knowler*, 4 Pet. 152; *Carington Co. v. Shepherd*, 20 How. 227; *State v. McAlister*, 24 Me. 139; *Jones v. Fales*, 4 Mass. 245; *Durham v. Daniels*, 2 Greene (Iowa), 518;

Bank of Newbury v. R. R. 9 Rich. S. C. 495; *Douglass v. Bank*, 19 Ala. 659; *Case v. Mobile*, 30 Ala. 538; *Burdine v. Lodge Co.* 37 Ala. 478; *Davis v. Bank*, 31 Ga. 69; *State v. Sherman*, 42 Mo. 210; *Shaw v. State*, 3 Sneed (Tenn.), 86; *People v. Treadwell*, 16 Cal. 220.

⁷ *State v. Wise*, 7 Ind. 645; *Danville Co. v. State*, 8 Blackf. 277; *Cicero Draining Co. v. Craighead*, 28 Ind. 274.

In most of the English personal acts it was customary, prior to the year 1851, to insert a clause, declaring that the act should be deemed public, and should be judicially noticed; and the effect of this clause was to dispense with the necessity, not only of pleading the act specially, but of producing an examined copy, or a copy printed by the printer for the crown. *Woodward v. Cotton*, 1 C., M. & R. 44, 47; *Beaumont v. Mountain*, 10 Bing. 404. These cases explain, and partially overrule, *Brett v. Beales*, M. & M. 421. Since the commencement of the year 1851, this clause,

§ 295. So by like reasoning, the courts will take judicial notice of the modes by which domestic laws are authenticated. Hence an English court is supposed to be judicially acquainted with the rules, practice, and prerogatives of parliament; ¹ an American court, with the rules, practice, and prerogatives of the federal and state legislatures to which it is subject. So, as we have seen, ² a court will take judicial notice of the journals of a legislature to determine whether an act is constitutionally passed; ³ or whether it has passed by reason of not having been returned in proper time by the governor. ⁴

Courts take notice of modes of authenticating laws.

§ 296. Notice of domestic law involves notice of all the systems of jurisprudence by which such domestic law is limited or otherwise affected. Hence a court is bound to take notice of such subsidiary codes or systems of law as may enter into the law by which it is governed. In submission to this principle, judicial notice will be taken, by com-

Subsidiary systems noticed; e. g. equity.

however, has been omitted, the legislature having enacted that every act made after that date shall be deemed a public act, and be judicially noticed as such, unless the contrary be expressly declared. The simplest mode of proving those acts, whether they be local and personal, or merely private, which, being passed before the year 1851, contain no clause declaring them to be public, or which, being passed since that date, contain an express clause, declaring them not to be public, is by producing a copy, which, if it *purports* to be printed by the queen's printer, need not be proved to be so; or the act may be proved by means of an examined copy, shown on oath to have been compared with the parliament roll. B. N. P. 225. Where the acts have not been printed by the printers for the crown, as is sometimes the case with respect to acts for naturalizing aliens, for dissolving marriages, for inclosing lands, and for other purposes of a strictly

personal character, an examined copy, or a certified transcript into chancery, if there be *one*, furnishes the regular proof. *Roos Barony*, Min. Ev. 145, cited *Hubb. Ev. of Sue.* 613. *Taylor's Ev.* § 1368.

¹ *Stockdale v. Hansard*, 7 C. & P. 731; 9 A. & E. 1; 2 P. & D. 1; *Sims v. Marryatt*, 17 Q. B. 392; *Cassidy v. Stewart*, 2 M. & Gr. 437; *Sheriff of Middlesex*, case of, 11 A. & E. 273. See *supra*, § 290.

² *Supra*, § 290.

³ *Gardner v. Collector*, 6 Wall. 499; *Fordyce v. Godman*, 20 Oh. (N. S.) 1; *Turley v. Logan*, 17 Ill. 151; *Prescott v. Canal*, 19 Ill. 324; *Albertson v. Robeson*, 1 Dall. 9; *Coleman v. Dobbins*, 8 Ind. 156; and see, as erroneously holding that the courts will not go behind the certificate, *Louisiana v. Richoux*, 23 La. An. 743. See fully cases cited *supra*, § 290.

⁴ *Wabash R. R. v. Hughes*, 38 Ill. 176. See fully *supra*, § 290.

mon law courts, of equity practice, when this is distinct from common law.¹

§ 297. Notice, on the same reasoning, will be taken of the articles of war binding the forces employed by the home authority.² This, however, is not to be so construed as to extend such notice to orders issued by a military commander during a civil war;³ though the fact that the orders of such commander are authoritative will be judicially noticed.⁴

§ 298. So the courts will take judicial notice of the law merchant, so far as the same is a general custom, or is part of private international law.⁵ “Those customs which have been universally and notoriously prevalent amongst merchants, and have been found by experience to be of public use, have been adopted as part of it” (the law merchant), “upon a principle of convenience, and for the benefit of trade and commerce; and when so adopted it is unnecessary to plead and prove them. They are binding on all without proof. Accordingly we find that usages affecting bills of exchange and bills of lading are taken notice of judicially.”⁶ It is accordingly held that judicial notice will be taken of the general lien of bankers.⁷ Judicial notice, also, will be taken of the rules of maritime law, so far as recognized by maritime nations.⁸

§ 299. So the courts will take notice of the ecclesiastical law of Christendom, for the purpose of determining how far it makes part of the common law.⁹

¹ *Maberley v. Robbins*, 5 Taunt. 625; *Elliott v. Evans*, 3 B. & P. 181; *Neeves v. Burrage*, 14 Q. B. 504; *Westoby v. Day*, 2 E. & B. 624.

² *Taylor's Ev.* § 5; *Bradley v. Arthur*, 4 B. & C. 304.

³ *Burke v. Miltenberger*, 19 Wall. 519. See *infra*, § 638.

⁴ *Gates v. Johnson Co.* 36 Tex. 144.

⁵ *Whart. on Ag.* § 678; *Edie v. East Ind. Co.* 2 Burr. 1226; *Young v. Cole*, 3 Bing. N. C. 724; *Sutton v. Tatham*, 10 Ad. & El. 27; *Bayliffe v. Butterworth*, 1 Ex. 445; *Bank of Met. v. Bank*, 1 Howard, 234; *Schuchardt v. Allen*, 1 Wall. U. S. 359; *Jones v.*

Fales, 4 Mass. 245; *Jewell v. Center*, 25 Ala. 498; *Bradford v. Cooper*, 1 La. An. 325; *Goldsmith v. Sawyer*, 46 Cal. 209. See *infra*, § 331.

⁶ *Denman, C. J.*, *Barnett v. Brandao*, 6 M. & G. 630.

⁷ *Ibid.*; *aff.* on this point in House of Lords, *Brandao v. Barnett*, 12 Cl. & F. 787. See, as to noticing custom of conveyances, *Rowe v. Grendal Ry.* & *Moo*. 398; 3 Sugd. V. & P. 28; for other authorities, *infra*, § 331.

⁸ *Chandler v. Grieves*, 2 H. Bl. 606, n. See *supra*, § 285; *infra*, § 331.

⁹ *Whart. Confl. of Laws*. § 171, and cases there cited; *Sims v. Marryatt*, 17 Q. B. 292. And see *supra*, § 284.

§ 300. A judge is bound to know the laws of his own state, but not those of a foreign country; nor can he, without proof, ordinarily accept as authoritative the laws of such foreign country, so far as they differ from his own.¹ Foreign laws must be proved. In England, even colonial laws and the laws of Scotland must be proved as facts.² Thus, when an action is brought on a contract on its face valid, and the defence claims that the contract was avoided by a statute which was part of the *lex loci contractus*, the contract having been made in another state, the *judex fori* will require such statute to be proved.³ But in respect to those matters in which the states, under the federal Constitution, are not foreign to each other (*e. g.* under the provision as to the reciprocal credit to be given to judgments), the courts of one state will take notice of another's statutes.⁴

§ 301. Where the seat of an obligation is in another state (*e. g.* in a state where prevails the Roman common law as distinguished from the English common law, or the converse), the *judex fori* will be bound to accept such foreign law if proved.⁵

¹ Weber, Heffter's ed. 11; Borst, Beweislust, 2; Di Sora v. Phillips, 10 H. L. Ca. 624; Bremer v. Freeman, 10 Moore P. C. 306; Hyde v. Hyde, 1 Prob. & Div. 133; Church v. Hubbard, 2 Cranch, 187; Strother v. Lucas, 6 Peters, 763; Ennis v. Smith, 14 How. 400; Dainese v. Hale, 91 U. S. (1 Otto), 13; Owen v. Boyle, 15 Me. 147; Woodrow v. O'Conner, 28 Vt. 776; Frith v. Sprague, 14 Mass. 455; Holman v. King, 7 Mete. 384; Kline v. Baker, 99 Mass. 254; Dyer v. Smith, 12 Conn. 384; Ludlow v. Van Rensselaer, 1 Johns. R. 94; Champion v. Kille, 15 N. J. Eq. 476; Baptiste v. DeVolunbrun, 5 Har. & J. 86; Balt. & O. R. R. v. Glenn, 28 Md. 287; Ingraham v. Hart, 11 Oh. 255; People v. Lambert, 5 Mich. 349; Davis v. Rogers, 14 Ind. 424; Bean v. Briggs, 4 Iowa, 464; Chumasero v. Gilbert, 24 Ill. 293; Moore v. Gwynn, 5 Ired. 187; State v. Jackson, 2 Dev. 563; Hooper v. Moore, 5 Jones (N. C.), 130; Syme v. Stewart, 17 La. An. 73;

Hemphill v. Bk. 6 Sm. & M. 44; Chouteau v. Pierre, 9 Mo. 3; Shed v. Augustine, 14 Kans. 282; Cooke v. Crawford, 1 Tex. 9. A party who desires to use a foreign law by way of defence must ordinarily plead it. Dainese v. Hale, 91 U. S. (1 Otto) 13.

² Dalrymple v. Dalrymple, 2 Hagg. Con. 54; Prowse v. Shipping Co. 13 Mood. P. C. R. 484; Bremen's case, 10 Q. B. 498; Taylor's Ev. §§ 5, 40, 1280.

³ See Whart. Contl. of Laws, § 771; Jones v. Palmer, 1 Dougl. Mich. 379; Martin v. Martin, 1 Sm. & M. 176.

⁴ State v. Hinchman, 27 Penn. St. 479. See Carpenter v. Dexter, 8 Wall. 513. Supra, § 96.

⁵ See cases in Whart. Contl. of Laws, § 771 *et seq.*; and see Copley v. Sanford, 2 La. An. 335; Kling v. Sejour, 4 La. An. 129; Young v. Templeton, 4 La. An. 254; Nimmo v. Davis, 7 Tex. 26; but see Bradshaw v. Mayfield, 18 Tex. 21.

If it is contrary to the principles of natural justice, or if its recognition would militate against the policy of the state of which he is an officer, he may refuse to accept it as interpretative of a contract on which he has to act. But whatever it may be, it must be proved to him, as would be any other fact in issue, to be the law of the foreign state from which it proceeds. And when proved, it must be accepted as would any other fact duly put in evidence.

§ 302. It is sometimes said that foreign laws must be proved by parol. It is clear that of such laws the *judex fori*, as we have already seen, will not take judicial notice. But it is not true that to the proof of foreign laws, the testimony of experts is always essential. Foreign statutes may be proved by exemplifications under the great seal of the sovereign; and by statute, if not by common law, the pamphlet laws issued by one state of the American Union are ordinarily received in evidence in the courts of the other states.¹ But be this as it may, it forms no exception to the general rule that of a foreign law (whether statute or otherwise) the *judex fori* takes no notice until it is proved.² And when a foreign legislative act is submitted to the interpretation of the court, the act must be itself produced.³

§ 303. Some conflict of opinion, however, exists as to whether foreign laws are to be proved as facts, *to the jury*. Judge Story is decided in declaring that the issue is for the court. "The court are to decide what is the proper evidence of the laws of a foreign country; and, where evidence is given of those laws, the

¹ See *infra*, §§ 309, 310.

² *Bremer v. Freeman*, 10 Moore P. C. 306; *Di Sora v. Phillips*, 10 H. L. Cas. 624; *Hyde v. Hyde*, L. R. 1 P. & D. 133; *Church v. Hubbard*, 2 Cranch, 187; *Ennis v. Smith*, 14 How. 400; *Owen v. Boyle*, 15 Me. 147; *Holman v. King*, 7 Metc. 384; *Cragin v. Lamkin*, 7 Allen, 396; *Knapp v. Abell*, 10 Allen, 485; *Kline v. Baker*, 99 Mass. 254; *Dyer v. Smith*, 12 Conn. 384; *Diez*, in re, 56 Barb. 591; *Leavenworth v. Brockway*, 2 Hill, 201; *Robert's Will*, 8 Paige,

446; *Ingraham v. Hart*, 11 Oh. 255; *Trasher v. Everhart*, 3 Gill & J. 234; *Merritt v. Merritt*, 20 Ill. 65; *McDeed v. McDeed*, 67 Ill. 545; *Charlotte v. Chouteau*, 25 Mo. 465; *Moore v. Gwynn*, 5 Ired. 187; *McNeill v. Arnold*, 17 Ark. 154; *Martin v. Payne*, 11 Tex. 292.

³ *Smith v. Potter*, 27 Vt. 304; *Hoes v. Van Alstyne*, 20 Ill. 201; *M'Deed v. M'Deed*, 67 Ill. 545; *Leonard v. Peeples*, 30 Geo. 61; *Kermott v. Ayer*, 11 Mich. 181; *Tryon v. Rankin*, 9 Tex. 595.

court are to judge of their applicability, when proved, to the case in hand."¹ The same view is maintained by the supreme court of New Hampshire.² But the rule that the *fact* of a foreign law must be proved to the jury like any other fact, while questions of competency and of construction are for the court, is that which now generally obtains.³

§ 304. In the proof of foreign laws, the best attainable evidence will be required; but no species of verification, incompatible with the laws and usages of such foreign country, will be exacted.⁴

§ 305. Parol proof, therefore (except in those cases in which by international comity or otherwise, the statutes of one state are treated in another state as self proving), being the agency by which foreign law is to be proved, it is usual to call experts by whom such proof is to be made.⁵ A mere certificate of a foreign expert, no matter how authoritative his office, will not be enough. The witness must be examined under oath.⁶

§ 306. But what is necessary to constitute an expert in this

¹ Conf. of Laws, § 638; *De Sobry v. De Laistre*, 2 Har. & Johns. 219, and *Trasher v. Everhart*, 3 Gill & Johns. 234, &c., which are cited as authorities, do not sustain, in whole, the position of the text.

² *Hall v. Costello*, 48 N. H. 179. See, also, *Munroe v. Douglass*, 5 N. Y. (1 Selden) 447.

³ See Judge Redfield's comments in the 6th edition of Story's Conf. of Laws, § 638 *a*. Diez, in re, 56 Barb. (N. Y.) 591; *Leavenworth v. Brockway*, 2 Hill (N. Y.), 201; *Robinson v. Dauchy*, 3 Barb. (N. Y.) 20; *Kline v. Baker*, 99 Mass. 254; *Dyer v. Smith*, 12 Conn. 384; *Ingraham v. Hart*, 11 Ohio, 255.

⁴ Whart. Conf. of L. § 773; Story Conf. of L. § 639, citing *Church v. Hubbard*, 2 Cranch, 187; *Isabella v. Pecot*, 2 La. An. R. 391. On the question of the existence of a foreign law it is held competent to read to the

jury from printed books of decisions and history. *Charlotte v. Chouteau*, 33 Mo. 194. Whether a court can take judicial notice of a foreign system of jurisprudence will be hereafter discussed. *Infra*, § 313.

⁵ *Hyde v. Hyde*, L. R., 1 P. & D. 133; *Brown v. U. S.* 6 Ct. of Claims, 171; *Dauphin v. U. S.* 6 Ct. of Cl. 221; *Church v. Hubbard*, 2 Cranch, 187; *Stein v. Bowman*, 13 Pet. 209; *Pickard v. Bailey*, 26 N. H. 152; *Barrows v. Downs*, 9 R. I. 447; *Dyer v. Smith*, 12 Conn. 284; *Gardner v. Lewis*, 7 Gill, 377; *Consolidated Real Est. Co. v. Cashow*, 41 Md. 59; *Smith v. Bartram*, 11 Ohio St. 690; *Greacons v. Davis*, 9 Iowa, 219; *Crafts v. Clark*, 38 Iowa, 237; *Walker v. Forbes*, 31 Ala. 9; *People v. Lambert*, 5 Mich. 319.

⁶ *Church v. Hubbard*, 2 Cranch, 187; *Ennis v. Smith*, 14 Howard, 400. See *Wilson v. Carson*, 12 Md. 54.

sense? In England it was once held that an expert in law need not be a practising lawyer of the country whose laws were to be proved; and it was considered sufficient if he should occupy a position which would familiarize him with the law as to which he was to testify. In conformity with this view, an hotel-keeper in London, a native of Belgium, who stated that he had formerly carried on the business of a merchant or commissioner of stocks in Brussels, was permitted to prove the law of Belgium on the subject of presentment of a promissory note, made in that country, payable at a particular place.¹ So a Jewess has been permitted to give parol evidence that her own divorce in a foreign country was in conformity with the laws of her church as sanctioned in that country.² In 1875, however, when in the court of probate and divorce the object was to prove the Italian law of succession, an affidavit of a "certified special pleader," who stated that he was "familiar with Italian law," was produced; Sir J. Hannen rejected an application for administration with the will annexed, based on this affidavit, and held that "the law of a foreign country cannot be proved even by a juriconsult, if his knowledge of it be derived solely from his having studied it in a foreign university."³

§ 307. In the United States a more liberal practice obtains. A layman has been permitted to prove Chinese commercial law;⁴ and officiating clergymen the law of marriage under which they officiated.⁵ So far as concerns the canon law, this would not be disputed in England, where it has been held that a Roman Catholic bishop, holding the office of coadjutor to a vicar-apostolic in England, is, by virtue of his office, a person so skilled

¹ *Vander Donckt v. Thellusson*, 8 C. B. 812.

² *Ganer v. Lanesborough*, Peake, 18, explained, however, by Lord Lyndhurst in 11 *Clar. & Fin.* 124, to rule only that a witness familiar with a foreign custom could prove such custom.

³ *Bonalli's case*, L. R. 1 P. D. 69; following *Bristow v. Sequeville*, 5 Ex. 275; 3 C. & K. 64. See, also, *Dalrymple v. Dalrymple*, 2 Hagg. Cons. R. 54; *Sussex Peerage case*, 11

Cl. & F. 85, 114-117; *Baron de Bode's case*, 8 Q. B. 208, 250-67; *Lord Nelson v. Lord Bridport*, 8 Bl. 527; *Perth Peerage case*, 2 H. L. Cas. 865, 873; *Duchess di Sora v. Phillips*, 33 L. J. Ch. 129, quoted in *The Stearine, &c., Company v. Heintzmann*, 17 C. B. N. S. 60, overruling *R. v. Dent*, 1 C. & Kir. 97.

⁴ *Wilcocks v. Phillips*, 1 Wall. Jr. 47.

⁵ *State v. Abbey*, 29 Vt. 60; *Amer. Life Ins. Co. v. Rosenagle*, 77 Penn. St. 507; *Bird v. Com.* 21 Grat. 800.

in the Roman Catholic law of marriage, as to be an expert capable of proving that law.¹

§ 308. An expert, thus called, is competent to prove that a book offered in evidence contains the statutes of the foreign state whose law is in controversy.² The expert may not only verify the statutes, but state the construction given to them, refreshing his memory by references.³ To admit

Experts
may verify
books and
authorities.

¹ *Sussex Peerage*, 11 Cl. & Fin. 84.

In *Am. Ins. Co. v. Rosenagle*, *ut supra*, Woodward, J., said: "The witness said he was the Catholic dean and parson at Odenheim; that 'these records have already existed many centuries, and each parson receives the church books from his predecessor, which altogether form one continued series;' and that he was the proper keeper and custodian of the records. The law of a foreign country on a given subject may be proved by any person, who, though not a lawyer, or not having filled any public office, is or has been in a position to render it probable that he would make himself acquainted with it. *Vander Donckt v. Thellusson*, 8 C. B. 812. Here the witness was the custodian of records which had existed for centuries, and which he swore had been kept in accordance with the laws in force when the entries were made. It was his duty to know, and he testified that he did know, the law relating to the records in his charge. His knowledge was just that which the responsible head of a public office would be assumed to have of the law which had controlled the past operations of his department; just that which would be imputed to a surveyor general in the year 1875, of the law that governed the land office in the year 1800. His position, and the facts to which he testified, made the rejected evidence competent."

² *Dalrymple v. Dalrymple*, 2 Con-

sist. R. 81; *Barrows v. Downs*, 9 R. I. 447; *Brush v. Wilkins*, 4 Johns. Ch. 506; *Jones v. Maffet*, 5 Serg. & R. 523; *People v. Calder*, 30 Mich. 87.

³ *Ibid.* "In the *Sussex Peerage Case*, A. D. 1844, 11 Clark & Finnelly, 85, Dr. Wiseman was called as a witness to prove the laws of marriage at Rome, and referred to a book containing the decrees of the Council of Trent, as regulating them. The judges of the committee of the house of lords expressed their opinions severally. Lord Brougham: 'The witness may refresh his recollection by referring to authorities,' &c. Lord Lyndhurst, Lord Chancellor: 'The witness may thus correct and confirm his recollection of the law, though he is the person to tell us what it is.' Lord Brougham agreed with the Lord Chancellor: 'The witness may refer to the sources of his knowledge; but the proper mode of proving a law is not by showing a book: the house requires the assistance of a lawyer who knows how to interpret it.' Lord Chief Justice Denman: 'There does not appear to be in fact any real difference of opinion; there is no question raised here as to any exclusive mode of getting at this evidence, for we have both materials of knowledge offered to us. We have the witness, and he states the law, which he says is correctly laid down in these books. The books are produced, but the witness describes them as authoritative, and explains them by his knowledge

a statute it is not necessary that there should be proof that it

of the actual practice of the law. A skilful and scientific man must state what the law is, but may refer to books and statutes to assist him in doing so. This was decided after full argument on Friday last (June 20), in the court of queen's bench (Baron de Bode's case). There was a difference of opinion, but the majority of the judges clearly held, on an examination of all the cases, and after full discussion, that proof of the law itself in a case of foreign law, could not be taken from the book of the law, but from the witness who described the law. If the witness says: "I know the law, and this book truly states the law," then you have the authority of the witness and of the book. You may have to open the question on the knowledge or means of knowledge of the witness, and other witnesses may give a different interpretation to the same matter, in which case you must decide as well as you can on the conflicting testimony; but you must take the evidence from the witness.'

"Lord Campbell concurred, saying: 'The foreign law is matter of fact. . . . You ask the witness what the law is; he may, from his recollection, or on producing and referring to books, say what it is,' &c. Lord Langdale, master of the rolls: 'Foreign law is matter of fact. A witness more or less skilled in it is called to depose to it. He may state it from his own knowledge, or refer to text-books or books of decisions.'

"Dr. Wiseman went on to testify that, by virtue of his office as Roman Catholic bishop and coadjutor to the vicar-apostolic in England, 'he had jurisdiction of the subject of Catholic marriages.'

"The Lord Chancellor: 'He comes within the description of a person

peritus virtute officii.' Lord Langdale: 'His evidence is in the nature of that of a judge.'

"It was admitted.

"Mr. Westlake (Conflict of Laws, § 414, note) seems to think that Lord Denman has overstated the result of the decision in the Baron de Bode's case. It might well be supposed that the chief justice ought to know what his own court of king's bench had decided, and on looking at the case in 8 Adolphus & Ellis, N. S. 208, we find his statement supported. A witness was offered, who testified that the feudal system in Alsace had been abolished by a decree of the French National Assembly of 1789. The decree itself was not produced. Lord Denman, chief justice, said that the rule admitting testimony of persons of science applied not only to unwritten but to written law. The question was not only the contents but the state and effect of the written law. The mere contents of the law might often mislead. He then criticised the decisions in 3 Esp. 58; 3 Camp. 166; 4 Camp. 155, and refers to *Lacon v. Higgins*, 3 Starkie, 178; *Picton's case*, 30 State Trials, 225, 491; *Middleton v. Janverin*, 2 Hagg. Cons. 437, 442, and says he 'can perceive no distinction between proof from a copy of the law, as we find it tendered and received, and the proof now tendered.' Justices Coleridge and Williams concurred, and gave their reasons at length. The written law itself, they say, would be of little use, compared with the opinion of a scientific person who could give the exact state of the law and its construction. Justice Patterson dissented, and held it necessary to produce the written law. The reasons given for his dissent go far to show the effect of the decision.

has not been repealed or modified down to the period when it is offered in evidence.¹

"It is thus decided that an expert may state the written law without producing it. Lord Denman says that they decided that the proof of the law was to be not from the book, but from the witness; and the reasons given bear out his statement.

"And it is but one step farther to decide, as was held in the *Sussex Peerage* case, that the witness may refer to the book to refresh his memory, &c.

"It is true that in the *Sussex Peerage* case the judges were not sitting as a court; but they were acting as a committee of privilege, to whom it had been referred by the house of lords to inquire into the validity of a foreign marriage, and the house of lords confirmed their decision.

"And in the last edition of Phillips on Evidence (2428, ch. 5, § 4), the law is stated substantially in the words of that decision. See, also, *Lord Nelson v. Bridport*, 8 Beavan, 527, 535, 537, 539, &c.

"Besides, in the case of the Spanish colonies, it is difficult to ascertain what their law is without the aid of an expert. Their law is composed, partly of the various codes of Spain, and partly of the various decrees, &c., contained in the *Recopilacion de Indias*, and the various decrees of later date. Some laws are in force in Spain only; some in the colonies only; and some are general. Schmidt's *Civil Law of Spain and Mexico*. Historical Summary.

"In the matter of *Robert's Will*, A. D. 1849, 8 Paige, 446, Chancellor Kent relied on the evidence of an expert in relation to the laws of Cuba, for the reasons we have stated above.

"In the case of *Vander Donckt v. Thellusson* (8 Manning, Granger &

Scott, 812, A. D. 1849), the court, after argument, admitted a person not a lawyer to prove the law of Belgium as to bills of exchange. In this case it is stated in the note, that the old French Code of Commerce (without the subsequent French modifications) was in force in Belgium." Potter, J., in *Barrows v. Downs*, *ut supra*.

¹ "By the positive law of this state, printed copies of the statutes and resolves of any of the United States, if purporting to be published under the authority of the proper government, are required to be admitted in all proceedings in our courts as *prima facie* evidence. § 5935, Comp. L. The same rule is laid down in New Hampshire without the aid of statute. *Emery v. Berry*, 8 Fos. 473.

"In the present case, Mr. Romeyn, an attorney and counsellor of this court, produced upon the stand a printed volume, purporting to be one of the Revised Statutes of New York, and dated in 1852, and he identified it as such.

"The book purported to contain the statutory regulations of the state on the solemnization of marriage, as such regulations existed in 1852, and the counsel for the defendant objected to the introduction of the volume on the ground that it was not competent, and for the reason that Mr. Romeyn was not shown to have any special knowledge on the subject.

"The import of this objection is not very clear, but we shall notice the grounds of it, as we understand them.

"It is said that this publication of 1852 was not proper to show what the law was in 1869.

"The witness, Mr. Romeyn, before the book was admitted, was interrogated at considerable length as to his

§ 309. The usual mode of authenticating foreign statutes is “by oath, or by an exemplification of a copy under the great seal of a state, or by a copy, proved to be a true copy by a witness who has examined and compared it with the original, or by a certificate of an officer, properly authorized by law to give the copy; which certificate must be duly proved. But such modes of proof as have been mentioned are not to be considered exclusive of others, *especially of codes of laws, and accepted histories of the law of a country.*”¹ By a convention between the United States and Italy, in 1868, copies of papers authenticated by official seals are to be received as legal evidence, in the courts of both countries.² The same provision is made in the treaty of December 5, 1868, between the United States and Belgium,³ and in other treaties. When there is an authorized interchange of statutes, then the volumes of the statutes received may be proved; or the statutes may be proved by exemplification, or by parol.⁴ The federal supreme court has accepted as sufficiently proved a copy of the French Civil Code, bearing the imprint of the French royal press, and received in international exchange, with the indorsement, “*Les Garde des Sceaux de France à la Cour Supreme des États Unis.*”⁵

knowledge whether the legislature of New York had made any change between 1852 and 1869, and he testified that he could not state positively that none had occurred. The fair inference, however, from his evidence, was, that if any change had been made he would have been likely to have known of it, and that he was not aware of any alteration.

“The court admitted the volume, and the defendant’s counsel excepted.

“I am of the opinion that the ruling was correct. It would seem that the book, as it stands described in the record, was within the provision before cited. It appeared to be a volume of New York statutes, published by authority of the state, and possessing this character of identity and authenticity, it approved itself as an item which was admissible. *People v.*

Lambert, 5 Mich. 349; *Merrifield v. Robbins*, 8 Gray, 150; *Inhabitants of Woodstock v. Hooker*, 6 Conn. 35; *Hale v. N. J. Steam Navigation Co.* 15 Conn. 539; *Emery v. Berry*, 8 Foster (N. H.), 473.” *Graves*, Ch. J., *People v. Calder*, 30 Mich. 87.

¹ *Wayne, J., Ennis v. Smith*, 14 Howard, 400; *Story*, Conf. of Laws, § 641. See *De Bode v. R.* 2 Q. B. 217.

² 15 Sts. at Large, 609.

³ Sts. at Large, 1870, 535.

⁴ *De Rothschild v. U. S.* 6 Ct. of Cl. 204; *Dauphin v. U. S.* 6 Ct. of Cl. 221. See *Grant v. Coal Co.* Sup. Ct. Penns. 1 Weekly Notes of Cases, 215.

⁵ *Ennis v. Smith*, 14 Howard, 400. See, however, *Munroe v. Guilleaume*, 3 Keyes (N. Y.), 30.

§ 310. By statutes existing in many of the United States, the volume of statutes of a sister state, printed by the authority of the state, is *primâ facie* proof of the authenticity of the statutes.¹ And in some jurisdictions such statutes are judicially noticed, from the printed volume, without an enabling statute.²

Printed
volumes
*primâ
facie*
proof of
statutes.

§ 311. When the statute of a state has received an authoritative construction by the courts of such state, such construction will be accepted extra-territorially by other courts.³ Hence it is that the reports of adjudged cases in another state are always worthy of consideration as indicating the law of such state,⁴ and may be received on an argument before a court, as exhibiting such extra-territorial law.⁵ Even the construction given in one state to an agreement of arbitration entered into in such state will be regarded as authoritative in other states.⁶

Judicial
construction
of one
state
adopted by
another.

§ 312. With the limitations which have been just expressed, an appellate court will not take notice of a statute of another state unless it is put in evidence in the court below.⁷

Statute
must be
put in evi-
dence.

¹ Story, Conf. of Laws, § 644; Hunt v. Johnson, 44 N. Y. 40; People v. Calder, 30 Mich. 87, quoted supra, § 308; Paine v. Lake Erie, 31 Ind. 283; Bradley v. West, 60 Mo. 34. "Foreign laws are to be proved as facts; and by the Gen. Sts. c. 131, § 64, the books of reports of cases adjudged in the courts of any other of the United States are admissible as evidence, in the courts of this state, of the unwritten or common law of those other states." Metcalf, J., Cragin v. Lamkin, 7 Allen, 396.

² Lord v. Staples, 3 Foster N. H. 449; Emery v. Berry, 8 Foster N. H. 486; Barkman v. Hopkins, 6 English Ark. 157.

³ Whart. Conf. Laws, §§ 430, 776; Elmendorf v. Taylor, 10 Wheat. 159; Blanchard v. Russell, 13 Mass. 1; Botanieo Med. Coll. v. Atchinson, 41 Miss. 188; Saul v. His Creditors, 17 Martin, 587.

⁴ Kilgore v. Buckley, 14 Conn. 362; Lockwood v. Crawford, 18 Conn. 361; Donald v. Hewitt, 33 Ala. 534; Marguerite v. Chouteau, 3 Missouri, 375.

⁵ Penobscot R. R. v. Bartlett, 12 Gray, 244; Cragin v. Lamkin, 7 Allen, 395.

⁶ Green v. R. R. 37 Ga. 456.

⁷ Hunt v. Johnson, 44 N. Y. 40; Bradley v. West, 60 Mo. 34. "The appellants made a further point, that the deed is invalid by the laws of Iowa, both upon the general principles heretofore discussed, and for the further alleged reason that a deed is not valid in that state until it is acknowledged by the grantor as his 'voluntary act.' We have no knowledge that such is the law of Iowa. A statute is offered to be read before us on this appeal, which was not offered to the jury. The amended Code (section 426) declares that the printed

§ 313. Whether a court can take judicial notice of a foreign jurisprudence, or, in other words, whether a court can receive any information of such jurisprudence, beyond what is put in evidence as a matter of fact, is a question as to which theory and practice conflict. On the one side we have the theory of the law forcibly stated by Lord Brougham, in his *Life of Lord Stowell*.¹ On the other side, it is almost the universal practice of courts, in determining questions of foreign jurisprudence involving Roman or canon law, to resort to standard Roman and canon law authorities as supplementary to and explanatory of the testimony of experts.² The

Foreign elementary jurisprudence can be noticed.

statutes of another state 'shall be admitted by the courts and officers of this state on all occasions, as presumptive evidence of such laws, and that the unwritten or common law of every other state may be proved as facts by parol evidence, and the books of reports of cases adjudged in their courts may be admitted as presumptive evidence of the law.' The statutes of other states, it has always been held, are to be proved as matters of fact. The Code simplifies the mode of proof by enacting that it may be made by producing a printed volume, purporting to be by authority of the state government, in which the statutes are contained. This is made presumptive evidence of its existence. It is, however, proof to be produced on the trial like other proof. It cannot be produced in the appellate court any more than the respondent could produce counter testimony before this court. that such is not the law of Iowa. The court of appeals does not sit for that purpose. The point is not before this court, and we are not competent to pass upon it." *Hunt, C., Hunt v. Johnson*, 44 N. Y. 40.

¹ "It is possibly hypercritical to remark that one inaccurate view pervades a portion of this judgment (in *Dalrymple v. Dalrymple*). Although the Scottish law was of course only matter of

evidence before Sir W. Scott, and as such for the most part deals with him, he yet allowed himself to examine the writings of commentators, and to deal with them as if he were a Scottish lawyer. Now, strictly speaking, he could not look at those text writers, nor at the decisions of the judges, except only so far as they had been referred to by witnesses, the skilful persons, the Scottish lawyers, whose testimony he was entitled to consider. For *they* alone could deal with either dicta of text writers or decisions of courts. *He* had no means of approaching such things, nor could avoid falling into errors when he endeavored to understand their meaning, and still more when he attempted to weigh them and to compare them together. This, at least, is the strict view of the matter, and in many cases the fact would bear it out. Thus we constantly see gross errors by Scottish and French lawyers of eminence, when they think they can apply an English authority. But in the case to which we are referring, the learned judge certainly deals as happily, and as safely, and as successfully with the authorities, as with the conflicting testimonies which it was his more proper province to sift and to compare." *Statesmen of the Time of Geo. III.* 2d ser. 76.

² See, also, cases cited *supra*, § 411.

conflict, however, may be reconciled by remembering that the testimony of experts to a foreign law is, like the testimony of an ordinary witness to any objective fact, subject to correction by recurring to such general laws (*e. g.* laws of general and primary jurisprudence, as well as laws physical and psychological) of which a court from the nature of things takes judicial notice.¹ A court also, as we have seen, takes notice of prior jurisprudences which lie at the basis of the local law;² and as such, in many if not all relations, the Roman and canon laws may be classed. A witness testifies to a physical fact, and the court, in construing and applying the testimony, avails itself of an ordinary knowledge of the laws of physics.³ So, when an expert testifies to a fact of a foreign jurisprudence based on the Roman or canon law, the court may resort to treatises on Roman or canon law, in order to construe and apply the testimony of the expert.

§ 314. But ordinarily, in one state in the American Union, the law of another state will be presumed to be the same as the *lex fori*, in all matters not involving local statutory idiosyncrasies; and this presumption continues until rebutted by proof of a difference.⁴ Yet, as is elsewhere seen, when there are two conflicting laws, that will be accepted which will best sustain an obligation.⁵ Hence the presumption of identity will not be applied when the effect

Law of
other state
presumed
not to differ
from
the *lex*
fori.

¹ Sup. §§ 282, 299. See *infra*, § 336.

² See *supra*, § 291.

³ *Infra*, §§ 335-6.

⁴ *Mostyn v. Fabrigas*, 1 Cowp. 174; *Smith v. Gould*, 4 Moore P. C. 21; *Territt v. Woodruff*, 19 Vt. 182; *Langdon v. Young*, 33 Vt. 182; *Chase v. Ins. Co.* 9 Allen, 311; *Cluff v. Ins. Co.* 13 Allen, 398; *Robinson v. Dauchy*, 3 Barb. 20; *Pomeroy v. Ainsworth*, 22 Barb. 118; *Huth v. Ins. Co.* 8 Bosw. 538; *Wright v. Delafield*, 23 Barb. 498; *City Bank v. Bidwell*, 29 Barb. 325; *Bradley v. Ins. Co.* 3 Lansing, 341; *Savage v. O'Neil*, 41 N. Y. 298; *Conolly v. Riley*, 25 Md. 402; *Smith v. Smith*, 19 Grat. 545; *Crake v. Crake*, 18 Ind. 150; *Davis v. Rogers*, 14 Ind. 424; *Crane v. Hardy*, 1 Mich. 56; *Ellis v. Maxson*, 19 Mich.

186; *Bean v. Briggs*, 4 Iowa. 464; *Crafts v. Clark*, 38 Iowa, 237; *Cooper v. Reaney*, 4 Minn. 528; *Brimhall v. Van Campen*, 8 Minn. 13; *Rape v. Heaton*, 9 Wis. 328; *Walsh v. Dart*, 12 Wis. 635; *Hickman v. Alpaugh*, 21 Cal. 225; *Hill v. Grigsby*, 32 Cal. 55; *State v. Patterson*, 2 Fred. (N. C.) L. 346; *Atkinson v. Atkinson*, 15 La. An. 491; *Thomas v. Beckman*, 1 B. Monr. 29; *Cox v. Morrow*, 14 Ark. 603; *Sharp v. Sharp*, 35 Ala. 571; *Warren v. Lusk*, 16 Mo. 102; *Houghtaling v. Ball*, 19 Mo. 84; *Lucas v. Ladew*, 28 Mo. 342; *Bundy v. Hart*, 40 Mo. 403; *Bemis v. McKenzie*, 13 Fla. 553; *Green v. Rugely*, 23 Tex. 539. See other cases *supra*, § 300; *infra*, § 315.

⁵ *Infra*, § 1250.

is to defeat the intention of the contracting parties.¹ It has been said that it will not be presumed that the law of a British colony is the common law of England.² And certainly it will not be presumed that the English common law exists in any state not settled by English colonists.³

§ 315. The exception just noted, as to local idiosyncrasies, is based on a sound principle. So far as concerns the leading principles of the English common law, as modified by American use, it is natural for the courts of one state, which adopts these principles, to assume that the conclusions it draws from them are the same as those drawn from the same premises by courts of other states.⁴ But this conclusion will not be made, as we have already seen, as to those states (*e. g.* Louisiana) in which the Roman law is accepted as a basis. Nor can a judge, as to a notoriously peculiar domestic rule, assume without absurdity that such rule obtains in a sister state.⁵

§ 316. While the interpretation of a contract, as is elsewhere seen, is usually to be settled, so far as concerns its formal parts, by the *lex loci contractus*, and so far as its

¹ See Whart. Confl. of Laws, § 780; *Cutler v. Wright*, 22 N. Y. 472; *Smith v. Whitaker*, 23 Ill. 367.

² *Owen v. Boyle*, 15 Me. 147.

³ *Whitford v. R. R.* 23 N. Y. 465; *Savage v. O'Neil*, 44 N. Y. 298; *Kermott v. Ayer*, 11 Mich. 181.

⁴ *Thurston v. Percival*, 1 Pick. 415; *Cutter v. Wright*, 22 N. Y. 472; *Whitford v. R. R.* 23 N. Y. 465; *Mendenhall v. Gately*, 18 Ind. 149; *Buckinghouse v. Gregg*, 19 Ind. 401; *Griffin v. Carter*, 5 Ired. N. C. (Eq.) 413; *Goodman v. Griffin*, 3 Stew. (Ala.) 160; *Averett v. Thompson*, 15 Ala. 678; *Reese v. Harris*, 27 Ala. 301; *Connor v. Trawick*, 37 Ala. 289; *Kermott v. Ayer*, 11 Mich. 181; *Gordon v. Ward*, 16 Mich. 360; *Smith v. Whitaker*, 23 Ill. 367; *Thompson v. Monroe*, 2 Cal. 99; *Spann v. Crummerford*, 20 Tex. 216; *Locke v. Huling*, 24 Tex. 311; and cases cited supra, § 314.

⁵ *McCulloch v. Norwood*, 58 N. Y. 563; *Hull v. Augustine*, 23 Wisc. 383.

"It seems to me to be conceded, on the part of the appellant, that, there being no proof of the law of Ohio on the subject, it is to be presumed that the law of Ohio is the same as our own. That such a presumption exists in respect to statute law is a proposition by no means so clear as appears to be supposed. Expressions are contained in some of the opinions which have been cited favoring the position that the presumption exists with reference to purely statutory regulations, but there is no authoritative decision to that effect. It is difficult to find any reason upon which such a rule can rest, and when the question is distinctly presented we regard it as still open to examination." *Rapallo, J.*, 58 N. Y. 567, *McCulloch v. Norwood*.

substance, by the *lex loci solutionis*, the admissibility of the evidence by which the contract is to be enforced is to be adjudicated according to the *lex fori*.¹ The mode of solemnizing instruments adopted by a state will be, as to instruments executed in its territory, extra-territorially respected, on the principle *locus regit actum*.²

III. EXECUTIVE AND JUDICIAL DOCUMENTS.

§ 317. Judicial notice will be taken of domestic executive decrees and ordinances of state ; when these are issued in authentic public documents they need not be proved.³ But a proclamation or other decree, if offered in evidence, must be in some way verified ;⁴ though the copy of a public document, as printed by order of the Senate of the United States, is competent evidence of a document communicated to the Senate by the President.⁵ Among such documents may be noticed : proclamations of peace or war ;⁶ government surveys of public lands ;⁷ orders of a military governor, or other commanding officer, during civil war, so far as bearing on judicial procedure,⁸ though otherwise when such orders come up collaterally ;⁹ the amnesty proclamations of the chief executive,¹⁰ and treaties with foreign powers, of the date of whose ratification notice will also be taken.¹¹ Unless a statute requires evidence of a specific character to accompany

Court will take notice of executive documents.

¹ British Lin. Co. v. Drummond, 10 B. & C. 903 ; Clark v. Mullick, 3 Moo. P. C. 299 ; Trimby v. Vignier, 1 Bing. N. C. 151 ; Bain v. R. R. 3 H. of L. Cas. 19 ; Yates v. Thomson, 3 Cl. & F. 577 ; Brown v. Thornton, 6 Ad. & E. 185 ; Donn v. Lippman, 5 Cl. & F. 1 ; Lawson v. Pinckney, 40 N. Y. Sup. Ct. 187. See Whart. Confl. of L. § 756 *et seq.* ; Story Confl. of L. §§ 556, 629.

² *Infra*, §§ 689, 697.

³ See Dupays v. Shepherd, 12 Mod. 216.

⁴ Van Omeron v. Dowick, 2 Camp. 44.

⁵ Whiton v. Ins. Co. 109 Mass. 21. See *supra*, § 127 ; *infra*, § 638.

⁶ Dodder v. Huntingfield, 11 Ves.

292 ; U. S. v. Ogden, Trial of Smith & Ogden, 287. See *infra*, § 338.

⁷ Mossman v. Forest, 27 Ind. 233 ; Hill v. Bacon, 43 Ill. 477 ; Atwater v. Schenck, 9 Wise. 160 ; Wright v. Phillips, 2 Greene (Iowa), 191.

⁸ Chapman v. Herold, 58 Penn. St. 106 ; Lanfear v. Mestier, 18 La. An. 497 ; New Orleans Canal Co. v. Templeton, 20 La. An. 141 ; Gates v. Johnson Co. 36 Tex. 141.

⁹ Burke v. Miltenberger, 19 Wall. 519. *Supra*, § 297.

¹⁰ Armstrong v. U. S. 13 Wallace, 154.

¹¹ United States v. The Peggy, 1 Cranch, 103 ; United States v. Reynes, 9 How. 127 ; Carson v. Smith, 5 Minn. 78.

the official acts which it authorizes, no such evidence will be required by the court.¹

§ 318. But a state court will not take notice of the practice of the several departments of the federal government;² nor will a state court take notice of federal executive acts partaking of a private character.³ Nor will notice be taken of the regulations adopted by particular branches of state service even by courts of the state,⁴ nor of the postal arrangements at particular towns,⁵ nor of a letter of the secretary of the navy addressed to the clerk of the court of the *judex fori*.⁶

§ 319. In the United States it has been held that the public seal of a state proves itself in the courts of such state, and in the courts of the United States.⁷ The same rule has been extended, and with reason, to the seals of such subordinate executive officers as are entitled to use seals.⁸ The seal of a foreign sovereign has also been held to be self-proving, so far as to constitute a *prima facie* case.⁹

§ 320. The seal of a notary public is judicially noticed, both *infra* and extra-territorially, by international courts, he being an officer recognized as such for commercial purposes by international law.¹⁰ His acts are *acta publica*, and as

¹ *Carpenter v. Dexter*, 8 Wall. 513.

² *Hensley v. Tarpey*, 7 Cal. 288.

³ *Dole v. Wilson*, 16 Minn. 525.

⁴ *Palmer v. Aldridge*, 16 Barb. (N. Y.) 131.

⁵ *Wiggins v. Burkham*, 10 Wall. 129.

⁶ *Mason's case*, 4 Ct. of Cl. 495.

⁷ *Church v. Hubbard*, 2 Cranch, 187; *U. S. v. Amedy*, 11 Wheat. 392; *Robinson v. Gilman*, 20 Me. 299; *Lincoln v. Battelle*, 6 Wend. 475; *Jones v. Gale*, 4 Mart. 635; *Wood v. Fitz*, 10 Mart. 196; *Garnet, ex parte*, 7 Leg. Int. 174. See *U. S. v. Wagner*, L. R. 2 Ch. App. 585. *Infra*, § 695.

⁸ *People v. John*, 22 Mich. 461.

⁹ *U. S. v. Wiggins*, 14 Pet. 334; *U. S. v. Rodman*, 15 Pet. 130; *Watson v. Walker*, 23 N. H. 471; *Spauld-*

ing v. Vincent, 24 Vt. 501; *Griswold v. Pitcairn*, 2 Conn. 85; *Thompson v. Stewart*, 3 Conn. 171; *Mumford v. Bowne*, Anth. (N. Y.) 40; *Hadfield v. Jameson*, 2 Munf. 53; *Stanglein v. State*, 17 Oh. St. 453; *Steward v. Swanzy*, 23 Miss. 502. See, however, *Beach v. Workman*, 20 N. H. 379. See *infra*, § 695.

¹⁰ *Supra*, § 123; Bayl. Bills, 490; *Furnell v. Stackpoole*, Milv. Ecc. Ir. R. 485; *Hutcheon v. Mannington*, 6 Ves. 823; *Wilson v. Stewart*, 1 Cranch C. C. 128; *Yeaton v. Fry*, 5 Cranch, 335; *Orr v. Lacy*, 4 McLean, 243; *Porter v. Johnson*, 1 Gray, 175; *Brown v. Bank*, 6 S. & R. 484; *Fellows v. Menasha*, 11 Wisc. 558. A court will not determine the title of a *de facto* sovereign. *State v. Dunwell*, 3 R. I. 127.

such must be noticed, subject, however, to impeachment, either as to validity or verity, by the contesting party.¹ But strictly, a court subject to the English common law requires proof of the seal of a foreign notary.² *A fortiori*, must proof of authenticity be given where there is no seal, and where the test is handwriting; as is frequently the case with German notarial certificates.³

§ 321. In England the common law in this relation has been so much modified by statute that the more recent ad-
judications are mostly without common law authority.

So of seals
of courts.

It may, however, be generally stated, that a judge will notice *ex officio* the seals of all infra-territorial courts which are authorized to have seals.⁴ So, with us, a federal judge will notice the seals of the several state courts.⁵ It is otherwise as to foreign courts.⁶ But courts acting under the provisions of the Constitution or laws of the United States are not, as to a state court, foreign courts in this sense.⁷

§ 322. Where handwriting, and not seal, is employed to attest genuineness, there is no reason why the signature of an executive officer should not in like manner be judicially noticed. It is at least as distinctive as a seal; it is equally the subject of a prosecution for forgery; and when accepted as a mode of solemn verification, should be equally respected by the courts.⁸

So of hand-
writing of
executive.

§ 323. As courts take judicial notice of laws binding themselves, it is essential that they should take judicial notice of the lines of demarcation which separate other sovereignties from that to which they are themselves subject. Hence a court is bound to take such notice of the existence and jurisdiction of all independent sov-

Judicial
notice
taken of
the exist-
ence of
foreign
sovereign-
ties.

¹ See Endemann's *Beweislehre*, p. 268; *Durant* L. c. No. 15; *Masc.* 920.

² *Earl's Trusts*, in re, 4 *Kay & J.* 300; *Davis's Trusts*, L. R. 8 *Eq.* 98; *Nye v. Macdonald*, L. R. 3 *P. C.* 331.

³ *Endemann*, *ut supra*. See *infra*, § 692.

⁴ *Foggassa's case*, 21 *Edw.* 3, 23, cited *Olive v. Gain*, 2 *Sid.* 146; *Melville's case*, 29 *How. St. Tr.* 707; *Green v. Walker*, 2 *Ld. Ray.* 893;

Kempton v. Cross, *Rep. temp. Hard.* 108; *State v. Snowden*, 1 *Brewster*, 218.

⁵ *Garnet*, *ex parte*, 7 *Leg. Int.* 174.

⁶ *De Sobry v. De Laistre*, 2 *Har. & J.* 191.

⁷ *Mangun v. Webster*, 7 *Gill*, 78.

⁸ See, to this effect, *Alcock v. Whatmore*, 8 *Dowl.* 615; *Short v. Williams*, 4 *Dowl.* 357; *R. v. Miller*, 2 *W. Bl.* 797; *R. v. Gully*, 1 *Leach*, 98; *Jones*

ereignities, if recognized as such by the sovereignty to which the court is subject.¹ But where a foreign state is unacknowledged by the home sovereign, then the existence and jurisdiction of such state must be proved by evidence.² And it would seem that a court is bound to take judicial notice of the fact that a foreign state has not been recognized by the home sovereign.³

§ 324. A court takes judicial notice of the judges of other courts in the same state.⁴ Under the provision of the Constitution of the United States, giving extra-territorial force to state judgments, the courts of one state will take notice that courts of record of another state have appropriate civil functions,⁵ and that the clerks of such

Notice
taken of
judicial of-
ficers and
practice.

v. Gale, 4 Mart. 635; *Wood v. Fitz*, 10 Mart. 196; *Scott v. Jackson*, 12 La. An. 640.

¹ *City of Berne v. Bk.* 9 Ves. 347; *Un. States v. Wagner*, L. R. 2 Ch. Ap. 585; *Gilston v. Hoyt*, 1 Johns. R. 543.

² *Yrisarri v. Clement*, 11 Moore, 314; 3 Bing. 432; 2 C. & P. 225. See *Taylor v. Barclay*, 2 Sim. 213.

³ *Taylor v. Barclay*, 2 Sim. 213. See, however, *Dolder v. Bank*, 10 Ves. 354, where Lord Eldon declared, and with some reason, that he could not judicially take notice of the non-recognition by England of the then Swiss revolutionary organization.

⁴ *Buford v. Hickman*, 1 Hempst. 232; *Follain v. Lefevre*, 3 Rob. (La.) 13; *Hawks v. Kennebec*, 7 Mass. 461; *Ripley v. Warren*, 2 Pick. 592; *Despau v. Swindler*, 3 Mart. N. S. 705; *McKinney v. O'Connor*, 26 Tex. 5; though this is doubted in England, as to inferior courts. *Van Sandau v. Turner*, 6 Q. B. 773; *Skipp v. Hooke*, 2 Str. 1080. See *Taylor's Ev.* § 19.

⁵ *Dozier v. Joyce*, 8 Port. (Ala.) 303. See *Vassault v. Seitz*, 31 Cal. 225; though see *Fellows v. Menasha*, 11 Wis. 558.

In England, it was for some time

open whether or not the judges of one of the superior courts are bound to notice who are the judges in the other superior courts. In *Skipp v. Hooke*, 2 Str. 1080; *Andr. 74*, *S. C.*, the question appears to have arisen; but, though reported by Strange, as well as Andrews, it does not appear from either report whether this particular point was actually determined by the court. Probably at the present day, Mr. Taylor argues, the question would be answered in the affirmative; on the ground that the appointment of the judges is a fact of general notoriety, and as, moreover, their signatures, when attached to judicial or official documents, must be judicially noticed by 8 & 9 Viet. c. 113, § 2. *Taylor's Ev.* § 19. It may, however, be noticed, on the other side, that the queen's bench has refused to notice who was judge of the then court of review. *Van Sandau v. Turner*, 6 Q. B. 773, 786. It is, however, settled that the superior courts will not, unless when called upon to review inferior courts of limited jurisdiction, (*Chitty v. Dendy*, 3 A. & E. 324; 4 N. & M. 842, *S. C.*), take cognizance of the customs and proceedings therein, unless such proceedings are statutory. *R. v. U. of Cambridge*, 2 Ld. Ray.

courts act according to statute law.¹ A court must take notice of its own practice,² and of that of other coördinate courts in the same state;³ but not of that of inferior courts, unless brought up on writ of error, or proved on trial.⁴ Where, however, the practice of an inferior court is governed by statute, this involves judicial notice by a superior court.⁵ So the prerogatives of other courts and their officers and attorneys will be to the same extent judicially noticed.⁶ The jurisdiction of such courts is necessarily matter of judicial notice.⁷

§ 325. A court will take, in each case, judicial notice of all the

1334. In that case the court refused to notice that the university court in Cambridge proceeded according to the rules of the civil law. See, also, *Lane's case*, 2 Rep. 16 *b*, note *d*; *Peacock v. Bell*, 1 Wms. Saund. 75; and *Dance v. Robson*, M. & M. 295.

Judicial notice, however, will be taken of the proceedings of courts, which, as in the case of the court of the V. Ch. of Oxford, under the act of 17 & 18 Vict. c. 81, § 45, must now, in all matters of law, be governed by the common and statute law, and not by the rules of the civil law. *Taylor*, § 19.

Thus, it is an undoubted rule of pleading, that nothing shall be intended to be out of the jurisdiction of a superior court but that which is so expressly alleged; and, consequently, the records in the courts of counties palatine, they being superior courts, need not state the cause of action to have arisen within the jurisdiction. *Peacock v. Bell*, 1 Wms. Saund. 74, recognized in *Gosset v. Howard*, 10 Q. B. 453; *Taylor's Ev.* § 72.

¹ *Morse v. Hewett*, 28 Mich. 481.

² *Pugh v. Robinson*, 1 T. R. 118; *Bethune v. Hale*, 45 Ala. 522; *Gilliland v. Sellers*, 2 Oh. N. S. 223.

³ *Tregany v. Fletcher*, 1 Ld. Raym. 154; *Caldwell v. Hunter*, 10 Q. B. 85; *Newell v. Newton*, 10 Pick. 470; *Tuck-*

er v. State, 11 Md. 322. Though the common law courts would not take judicial notice of chancery practice. *Dicas v. Brougham*, 1 M. & Rob. 309; *Sims v. Marryatt*, 17 Q. B. 288.

⁴ *Chitty v. Dendy*, 3 A. & E. 324; 4 N. & M. 842; *R. v. Cambridge*, 2 Ld. Raym. 1334; *March v. Com.* 12 B. Mon. 25; *Cutter v. Caruthers*, 48 Cal. 178; *Keeler, ex parte*, Hemp. 306. See *Cherry v. Baker*, 17 Md. 75.

⁵ *Hunter v. Neck*, 3 M. & Gr. 181; *Lindsay v. Williams*, 17 Ala. 229; *Peterson, ex parte*, 33 Ala. 74; *Rodgers v. State*, 50 Ala. 102; *Kilpatrick v. Com.* 31 Penn. St. 198; *Tucker v. State*, 11 Md. 322; *Chambers v. People*, 5 Ill. 351; *Graham v. Anderson*, 42 Ill. 514; *Williams v. Hubbard*, 1 Mich. 446; *Gilland v. Sellers*, 2 Ohio. St. 223; *Buckinghouse v. Gregg*, 19 Ind. 401; *McGinnis v. State*, 24 Ind. 500, and cases cited in next note.

⁶ *Ogle v. Norcliffe*, 2 Ld. Ray. 869; *Chatland v. Thornley*, 12 East, 544; *Hunter v. Neck*, 3 M. & Gr. 181; *Whitaker v. Wisbey*, 12 C. B. 56; *Buford v. Hickman*, Hemp. 232; *McKinney v. O'Connor*, 26 Tex. 5.

⁷ *Doe v. Caperton*, 9 C. & P. 116; *Spooner v. Juddow*, 6 Moore P. C. 257.

proceedings and pleadings in such case;¹ and hence, even after an appeal and reversal, and remander of the proceedings, the court will take notice from the record who were the original attorneys.² So a court will recognize the professional signatures of the attorneys to a suit.³ So a court takes cognizance of the subordinate officers of its own, though not of other courts.⁴

§ 326. While a court takes notice of its own records, it cannot travel for this purpose out of the records relating to the particular case. Thus in one case the court cannot take notice of the proceedings in another case, unless such proceedings are put in evidence.⁵ Nor will a court take notice of the signatures of parties, unless such signatures be admitted or proved.⁶ How far a court takes notice of the seals of courts has been already discussed.⁷

IV. NOTORIETY.

§ 327. Of notoriety, the Roman law gives no direct limitation. In the standards, the word “notorium” is used; but in a sense which is undefined.⁸ It was assumed, indeed, by the jurists, that it was not necessary to prove to the *judex quod omnes sciunt*; but we have no rules given as to the extent of this *scientia omnium*. The judge was left to his own conscientious judgment of the facts submitted to or elicited by him; and among these were numbered the ordinary phenomena of natural and of social life. On the other hand, *fama opinio publica*, or *rumor*, was not evidence, unless it should be notorious to the great body of men, including the *judex*.

§ 328. The canon law, which found its way into our earlier procedure much more thoroughly than did the Roman, took in theory the position *quod non in actis, non in*

¹ U. S. v. Erskine, 4 Cranch C. C. 299; Pagett v. Curtis, 15 La. An. 451; State v. Schilling, 14 Iowa, 455; Brucker v. State, 19 Wisc. 539; Leavitt v. Cutler, 37 Wisc. 46.

² Symmes v. Major, 21 Ind. 443.

³ Masterson v. Le Claire, 4 Minn. 163.

⁴ Norvell v. McHenry, 1 Mich. 227; Dyer v. Last, 51 Ill. 179.

⁵ People v. De la Guerra, 24 Cal. 73; Lake Water Co. v. Cowles, 31 Cal. 215; State v. Edwards, 19 Mo. 674; Baker v. Mygatt, 14 Iowa, 131.

⁶ Alderson v. Bell, 9 Cal. 315; Masterson v. Le Claire, 4 Minn. 163.

⁷ See supra, § 321.

⁸ See L. 6, § 3, De poen. xlviii. 19; L. 7, Cod. De accus. ix. 2.

mundo. Even when the parties threw themselves on the personal knowledge of the judge, this knowledge was limited to matters juridical. That which the judge knew in matters non-juridical could not be used for evidential purposes.¹ What, however, the judge officially knew, as judge, need not be proved. In this sense it was said that *facta notoria non indigent probatione*.² He was held to have official knowledge of all generally recognized facts, of which he, with many others, was cognizant. The force to be attached to *notorium*, in other words, the question, *quid notorium probet*, was much discussed. It was conceded that *notorium facti transeuntis, interpolatum, et juris*, must, if denied, be proved.³ But the settled rule was finally imposed, that notoriety, when unchallenged, was proof on which the judgment of the court could rest. The *notorium* makes *probationem probatam*; ⁴ it is equivalent to *manifestum* or *liquidum*; ⁵ it is distinguishable from *fama* in that *notorium* gives complete proof, while *fama* gives incomplete proof. Much subtle thought was given to the question as to what degree of extension was necessary to constitute *notorium*; but like the sophists' puzzle as to what is the number of grains of sand which when reached make a heap of that which was not a heap before, the question was one which was never satisfactorily settled.⁶ Ultimately it was agreed that *quod publice constet* must be regarded as notorious; and that as to whether this standard is reached must be determined by the discretion of the court.⁷

§ 329. Our own law, as we have already shown,⁸ adopts the position that reason and evidence are the coördinate factors which go to make up proof; and that a judge, in trying a case, must not only exercise his own logical faculties, in construing and applying evidence, but must draw on his own sources of knowledge for such information as is common to all intelligent persons of the same community. Such information, however, must not only be thus common, but must be of indisputable truth. When it becomes disputable it ceases to fall under the head of notoriety.

¹ Gloss. veritas in L. 6, § 1, de off. praes. i. 18; Durant. II. 2. de prob. § 1, nr. 27. See Masc. qu. I. nr. 7.

² Endemann, 75.

³ Masc. c. 1107, nr. 9, 14.

⁴ Bald. in L. 1 Cod. vii. 75.

⁵ Masc. conclu. 1105.

⁶ See Masc. concl. 1105, nr. 16.

⁷ Endemann's Beweislehre, 77.

⁸ Supra, §§ 1-15.

§ 330. Hence evidence is not needed to establish that which is so notorious to persons of ordinary intelligence that it either admits of no doubt, or could at the moment be established by a profusion of indisputable testimony. The Roman law does not use this specific term in this relation, but it receives as juridical evidence those conditions of which, as part of ordinary experience, every one is cognizant, — *quod omnes sciunt*; ¹ or as to which, as matters of every day knowledge, there is no possibility of dispute.² The canon law gives a wider course to this notoriety, when it speaks of an *evidentia rei*; *quae nulla tergiversatione celari potest*.³

§ 331. When a custom is general and notorious, it will be noticed by the courts without proof. This rule has been held to include such customs of merchants as are general and notorious,⁴ or as have been sanctioned by the courts;⁵ provided such customs are intelligible without extrinsic proof.⁶ So judicial notice will be taken of the custom of the road, when such is notorious, *e. g.* as to passing to right or left;⁷ the customs of the sea, even though not established by statute law, or executive ordinance, or judicial decision, when such customs are general and notorious;⁸ the custom of conveyancers, so far as such custom is one of the uniform incidents of ordinary conveyancing;⁹ the custom of lawyers, so far as it is in like manner uniform and familiar;¹⁰ and the general custom to observe holidays.¹¹ But recognition will not extend to customs which are simply the practices of a trade with which

¹ L. 213, § 2, 223, pr. D. de V. S.

² Hefter's Appendix to Weber, 250.

³ C. 10, x. De cohab. cler.

⁴ Barnett v. Brandao, 6 M. & Gr. 630; Manny v. Dunlap, 3 West. Jur. 329; S. C. 17 Pitts. L. J. 11. See supra, § 298.

⁵ See fully supra, § 298.

⁶ Bodmin Mines Co. in re, 23 Beav. 370.

⁷ Leame v. Bray, 3 East, 593; Turney v. Thomas, 8 C. & P. 104.

⁸ See Zugasti v. Lamer, 12 Moore P. C. 331; Maddox v. Fisher, 14 Moore P. C. 163; Tuff v. Warman, 2 C. B. N. S. 740; Chadwick v. City

of London, 6 E. & B. 771; Smith v. Voss, 2 H. & N. 97; Morrison v. Gen. St. Nav. Co. 8 Exch. 733; Gen. St. Nav. Co. v. Morrison, 13 C. B. 581; The Spring, L. R. 1 Ad. & Ec. 99; The Concordia, L. R. 1 Ad. & Ec. 93; Gen. St. Nav. Co. v. Hedley, L. R. 3 P. C. 44.

⁹ Willoughby v. Willoughby, 1 T. R. 772; Rowe v. Grenfel, Ry. & M. 398; Doe v. Hilder, 2 B. & A. 793; Howard v. Ducane, 1 Turn. & R. 86; Sugd. V. & P. 78.

¹⁰ See Whart. on Agency, § 596.

¹¹ Sasscer v. Bank, 4 Md. 409. See infra, § 335.

the court cannot be supposed to be familiar.¹ In England it has been ruled that a custom of London, to be judicially noticed without proof, must be certified to by the recorder;² though when a custom, as a matter of local usage, is noticed in a city court, such custom will be noticed before a court to which such case is removed in error.³

§ 332. So notice will be taken of the ordinary course of the seasons, with their general effects on agriculture;⁴ but not of special alternations of weather.⁵

Course of seasons.

§ 333. Judicial notice will also be taken of the ordinary limitations of human life as to age,⁶ so as to determine that children of a parent, who died twenty-one years previously, were at the particular time of age;⁷ or that a person living a hundred years ago would not be living now.⁸

Limitations of human life as to age;

§ 334. So the court will take notice of the ordinary periods of gestation, so as to assume the non-legitimacy of children born ten months after intercourse, or, when prior non-intercourse is proved, five months after the act of intercourse;⁹ and the same notice will be taken when the object is to determine questions of conflicting paternity.¹⁰ So a court of equity, in distributing trust funds, assumes that women, after the age of fifty-three, are incapable of child-bearing.¹¹

and as to gestation.

§ 335. So the courts will take notice of the demonstrable conclusions of science. Thus a court will take notice of the movements of the heavenly bodies;¹² of the grada-

Conclusions of

¹ *Johnson v. Robertson*, 31 Md. 476.

⁶ *Allen v. Lyons*, 2 Wash. 475.

² *Lyons v. De Pass*, 11 A. & E. 326; 9 C. & P. 68; *Bruin v. Knott*, 12 Sim. 452; *Stainton v. Jones*, 1 Doug. 380; *Bruce v. Wait*, 1 M. & Gr. 39; *Crosby v. Hetherington*, 4 M. & Gr. 933. See *Taylor on Evidence*, § 5.

⁷ *Floyd v. Johnson*, 2 Litt. (Ky.) 109.

⁸ *Infra*, § 1274.

³ *Bruce v. Wait*, 1 M. & Gr. 41, n. a.

⁴ *Patterson v. McCausland*, 3 Bland (Md.), 69; *Floyd v. Ricks*, 14 Ark. 286. See *Hoyle v. Cornwallis*, 1 Stra. 387; *Hanson v. Shackleton*, 1 Dowl. Q. C. 48.

⁹ See L. 5. D. (ii. 4.); *R. v. Luffe*, 8 East, 202; *Heathcote's case*, 1 Macq. Sc. C. 277; *Whitman v. State*, 34 Ind. 360. See *infra*, § 1298.

¹⁰ *Bowen v. Reed*, 103 Mass. 46. See *Paul v. Padelford*, 16 Gray, 263. *Infra*, § 1298.

¹¹ *Widdow's Trusts*, L. R. 11 Eq. 408; *Haynes v. Haynes*, 35 L. J. Ch. 303.

⁵ *Dixon v. Nicolls*, 39 Ill. 372.

¹² *Infra*, § 665. See *Bury v. Blogg*,

science and political economy. tions of time by longitude ;¹ of the magnetic variations from the true meridian ;² of the coincidence of days of the month with days of the week,³ of the order of the months,⁴ of the coincidence of the year of the sovereign's reign with the common notation ;⁵ of the days on which fall Sundays and holidays ;⁶ of the public coin and currency,⁷ though not of a foreign currency ;⁸ of the existence of " Confederate " currency, and its large depreciation during the civil war,⁹ though not of the exact fluctuations of any particular kind of currency ;¹⁰ of the standard weights and measures ;¹¹ of distances as calculated by a map ;¹² of the ordinary time of voyages,¹³ of the habits of men in masses, and of animals,¹⁴ of the various meanings of the term " month " whether calendar or lunar ;¹⁵ and of the value of ordinary labor.¹⁶ So a court, when a lottery prosecution is on trial, will take notice, without evidence, of the peculiar nature and character of lotteries.¹⁷ Yet conclusions dependent on inductive proof, not yet accepted as necessary, will not be judicially noticed. Thus it has been held, that judicial notice will not be taken of the alleged conclusion that each concentric layer of a tree notes a year's growth.¹⁸ As we have already seen, a judge may draw

12 Q. B. 877; though see *Collier v. Nokes*, 2 C. & K. 1012.

¹ *Curtis v. Marsh*, 1 C. B. (N. S.) 153.

² *Bryan v. Beckley*, 6 Litt. (Ky.) 91. *Infra*, § 665.

³ *Allman v. Owen*, 31 Ala. 167; *Sprowl v. Lawrence*, 33 Ala. 674; *Page v. Faucet*, Cro. El. 227; *Tutton v. Darke*, 5 H. & N. 649; *Hoyle v. Cornwallis*, 1 Str. 387; *Hanson v. Shackelton*, 4 Dowl. 48.

⁴ *R. v. Brown*, M. & M. 164.

⁵ *Holman v. Burrow*, 2 Ld. Ray. 795; *R. v. Pringle*, 2 M. & Rob. 276.

⁶ *Sasscer v. Bank*, 4 Md. 409; *Hanson v. Shackelton*, 4 Dowl. 48; *Pearson v. Shaw*, 7 Ir. L. R. 1; *Rodgers v. State*, 50 Ala. 102.

⁷ *Glossop v. Jacob*, 1 Stark. R. 69; *Kearney v. King*, 2 B. & Al. 301; *Lampton v. Haggard*, 3 T. B. Monr.

149; *Jones v. Overstreet*, 4 T. B. Monr. 547; *U. S. v. Burns*, 5 McL. 23; *Daily v. State*, 10 Ind. 536.

⁸ *Kermott v. Ayer*, 11 Mich. 181.

⁹ *Buford v. Tucker*, 44 Ala. 89. See *infra*, § 948.

¹⁰ *Modawell v. Holmes*, 40 Ala. 391.

¹¹ *Hockin v. Cooke*, 4 T. R. 314.

¹² *Mouflet v. Cole*, L. R. 7 Exc. 70.

¹³ *Oppenheim v. Leo Wolf*, 3 Sanf. N. Y. Ch. 571.

¹⁴ *Infra*, § 1295.

¹⁵ *Johnston v. Hudleston*, 4 B. & C. 932; *Turner v. Barlow*, 3 F. & F. 946; *Bluck v. Rackman*, 5 Moo. P. C. 308; *Simpson v. Margitson*, 11 Q. B. 23.

¹⁶ *Bell v. Barnet*, 2 J. J. Marsh. 516. See *Seymour v. Marvin*, 11 Barb. 80.

¹⁷ *Boullemet v. State*, 28 Ala. 83.

¹⁸ *Patterson v. McCausland*, 3 Bland (Md.), 69.

either on his own memory, or on works of science or art, to determine the meaning of words.¹

¹ Supra, § 282.

An authoritative and interesting exposition of the law in this relation is given by Mr. Justice Swayne, in a case decided by the supreme court of the United States, in 1876. *Brown v. Piper*, 91 U. S. (1 Otto) 37.

The question before the court related to the infringement of a patent "for new and improved method of preserving fish and meats." The invention is alleged to consist "in a method of preserving fish and other articles in a chamber, and cooling the latter by means of a freezing mixture, so applied that no communication shall exist between the interior of the preserving chamber and that of the vessels in which the freezing mixture is placed." The specification continues: "I do not profess to have invented the means of artificial congelation, nor to have discovered the fact that no decay takes place in animal substances so long as they are kept a few degrees below the freezing point of water, but the practical application of them to the art of preserving fish and meats, as above described, is a new and very valuable improvement. The apparatus for freezing fish and keeping them in a frozen state may be constructed in various ways and of different shapes. The apparatus shown in the drawing, however, will suffice to illustrate the principle and mode of operation." The patent closes with the following claim:—

"Having described my invention, what I claim as new, and desire to secure by letters-patent, is, *preserving fish or other articles in a close chamber by means of a freezing mixture, having no contact with the atmosphere of the preserving chamber, substantially as set forth.*"

The court held that the patent was void on its face, on the ground that the specifications contain no novelty. In the course of his opinion Judge Swayne quotes as authority, *Ure's Dictionary of Arts*, and *Watts' Dictionary of Chemistry*; and, after saying that "evidence of the state of the art is admissible in actions at law, under the general issue, without a special notice, and in equity cases without any averment in the answer touching the subject," declares that such evidence "consists of proof of what was old and in general use at the time of the alleged invention;" and is received for three purposes and none other: to show what was then old; to distinguish what was new; and to aid the court in the construction of the patent." He then proceeds as follows:—

"Of private and special facts, in trials in equity and at law, the court or jury, as the case may be, is bound carefully to exclude the influence of all previous knowledge. But there are many things of which judicial cognizance may be taken. 'To require proof of every fact, as that Calais is beyond the jurisdiction of the court, would be utterly and absolutely absurd.' *Gres. Ev. in Eq.* 294. Facts of universal notoriety need not be proved. See *Taylor's Ev.* § 4, note 2. Among the things of which judicial notice is taken are: The law of nations; the general customs and usages of merchants; the notary's seal; things which must happen according to the laws of nature; the coincidences of the days of the week with those of the month; the meaning of words in the vernacular language; the customary abbreviations of Christian names; the accession of the chief magistrate

§ 336. So judicial notice will be taken of the familiar principles of psychological laws. The usual effects of the passions of jealousy, of avarice, of hatred, and of revenge will be therefore taken for granted;¹ as well as the instincts which impel to the preservation and propagation of human life.² The same recognition will be given to ordinary and well established physical laws.³ The court, for in-

Ordinary psychological and physical laws.

to office and his leaving it. In this country such notice is taken of the appointment of members of the cabinet, the election and resignations of senators, and of the appointment of marshals and sheriffs, but not of their deputies. The courts of the United States take judicial notice of the ports and waters of the United States where the tide ebbs and flows; of the boundaries of the several states and judicial districts, and of the laws and jurisprudence of the several states in which they exercise jurisdiction. Courts will take notice of whatever is generally known within the limits of their jurisdiction; and if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper. This extends to such matters of science as are involved in the cases brought before him. See 1 Greenleaf's Evidence, 11; Gresley's Ev. supra; and Taylor's Ev. § 4, and post.

"In *The Ohio L. & T. Co. v. Debolt*, 16 How. 435, it was said to be 'a matter of public history, which this court cannot refuse to notice, that almost every bill for the incorporation of companies,' of the classes named, is prepared and passed under the circumstances stated. In *Hoare v. Silverlock*, 12 Ad. & Ellis N. S. 624, it was held that, where a libel charged that the friends of the plaintiff had 'realized the fable of the frozen snake,' the court would take notice

that the knowledge of that fable existed generally in society. This power is to be exercised by courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative.

"The pleadings and proofs in the case under consideration are silent as to the ice-cream freezer. But it is a thing in the common knowledge and use of the people throughout the country. Notice and proof were, therefore, unnecessary. The statute requiring notice was not intended to apply in such cases. The court can take judicial notice of it, and give it the same effect as if it had been set up as a defence in the answer and the proof was plenary. See *M. & A. Glue Co. v. Upton*, 6 Patent Office Gazette, 843; and *Needham v. Washburn*, 7 Ibid. 651, both decided by Mr. Justice Clifford upon the circuit. We can see no substantial diversity between that apparatus and the alleged invention of the appellee. In the former, as in the apparatus of the appellee, 'the freezing mixture' has 'no contact with the atmosphere' of the chamber where the work is to be done."

¹ See Whart. Cr. Law, §§ 3461-64. And see *infra*, §§ 1258-61 *et seq.*

² *Allen v. Willard*, 67 Penn. St. 374.

³ See *infra*, § 1271.

stance, will take notice that distilled liquors are intoxicating; though it is otherwise as to beer and wine.¹ So it will be left to a jury, without calling in experts, to determine, from their own knowledge, whether vaccination is a proper precaution for persons exposed to small-pox.²

¹ *Com. v. Peckham*, 2 Gray, 514; *Klare v. State*, 43 Ind. 483.

² "It must be assumed that the jury found, under the instructions given them, that the defendant, being the owner of a tenement, knowing that it was so infected by the small-pox as to be unfit for occupation and to endanger the health and lives of the occupants, and concealing this knowledge from the plaintiff to induce him to hire it, leased it to the plaintiff; that the plaintiff and his children took the disease by reason of the infection of the tenement; that the plaintiff was ignorant of its dangerous condition, and that no negligence of his contributed to their taking the disease. Upon these facts the defendant is guilty of actionable negligence, and is liable for whatever injury the plaintiff has sustained by reason thereof.

"In *Sweeny v. Old Colony & Newport Railroad Co.* 10 Allen, 368, 372, the rule is stated to be, that 'in order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff, which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests.' Negligence consists in doing or omitting to do an act in violation of a legal duty or obligation. In this case the defendant knew that the tenement was so infected as to endanger the health and life of any person who might occupy it. It was a plain duty of humanity on his part to inform the plaintiff of

this fact, or to refrain from leasing it until he had used proper means to disinfect it. If the defendant had invited any person to enter his tenement, knowing that there was a dangerous obstruction or pitfall in it, he would be liable; the negligence was no less gross because the danger was a secret one which could not be detected by inspection or examination. *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216; *French v. Vining*, 102 Mass. 132.

"The defendant contends that the injury complained of is not of such a nature as to give a right of action, 'because in diseases which are usually designated as contagious, the connection between the origin of the disease and the disease itself is not a matter cognizable by our senses,' and 'the source from which and the manner in which contagion is communicated is too uncertain and unsusceptible of proof to form the foundation for an action.' In the trial of cases, as in the ordinary affairs of life, it is often impossible to establish the connection between cause and effect with absolute certainty. But evidence which produces a moral conviction is sufficient. It is upon such convictions that men act in the important concerns of life, and no greater certainty is required or attainable in the administration of the law. The defendant's negligence was an adequate cause of the injury to the plaintiff. The evidence reasonably satisfied the minds of the jury that it was the operating cause, and the defendant cannot escape the consequences of his

§ 337. The courts will of their own motion take notice of the political appointments of the land, — so far as concerns the names and tenure of its principal political agents and their constitutional powers.¹ This includes the sheriffs of the several counties in the same state.² So a court will take notice of the officers to be elected at the stated elections in its own state.³ But the existence of deputy and subordinate officers, though in the same state, must be proved.⁴

negligence upon the plea that the connection between cause and effect cannot be proved beyond possibility of doubt.

“The defendant also contends that the presiding judge erred in declining to instruct the jury that if the plaintiff Ezra Minor did not cause his children to be vaccinated within a reasonable time after he came with them into the commonwealth, the minor plaintiffs could not recover. Upon this subject the judge instructed the jury that it was the duty of the plaintiff to ‘take all such precautions as a man of ordinary care and prudence would take under like circumstances;’ that it was for the jury to say whether vaccination was a proper precaution, and, if so, whether he procured his children to be vaccinated within a reasonable time and by a suitable person. These instructions were sufficient. We cannot say, as a matter of law, that under all circumstances vaccination is a necessary precaution to be taken by a person exposed to the small-pox. It is a question of fact, and was properly left to the jury. The argument of the defendant, that the plaintiff, in neglecting to have his children vaccinated, was guilty of a violation of law, has no foundation in the facts of the case. He caused them to be vaccinated eight days after he arrived in this country, and it does not appear that he was guilty of any violation

of the statute. General Statutes, c. 26, § 27.

“Upon the whole case we are of opinion, that, upon the facts found by the jury, the plaintiffs are entitled to recover, and that the instructions given at the trial were sufficiently favorable to the defendant.” Morton, J., *Minor v. Sharon*, 112 Mass. 487.

¹ Weber, Heffter's ed. 250; *Holman v. Burrow*, 2 Ld. Ray. 794; *Grant v. Bagge*, 3 East, 128; *Whaley v. Carlisle*, 17 Ir. Law R. 792; *R. v. Jones*, 2 Camp. 131; *York R. R. v. Winans*, 17 How. 30; *Chapman v. Herrold*, 58 Penn. St. 106; *Bank of Augusta v. Earle*, 13 Pet. 590; *Bennett v. State*, Mart. & Y. 133; *Hizer v. State*, 12 Ind. 330; *State v. Williams*, 5 Wise. 308; *Lindsay v. Atty. Gen.* 3 Miss. 568; *Fancher v. De Montegre*, 1 Head, 40; *Himmelmann v. Hoadley*, 44 Cal. 213; *Burnett v. Henderson*, 21 Tex. 588; *Deweese v. Colorado Co.* 32 Tex. 570.

² *Ingram v. State*, 27 Ala. 17; *Thompson v. Haskell*, 21 Ill. 215; *Alexander v. Burnham*, 18 Wise. 199. See *Holman v. Burrow*, 2 Ld. Ray. 794.

³ *State v. Minnick*, 15 Iowa, 123; though not so as to other states. *Taylor v. Rennie*, 35 Barb. 272.

⁴ *R. v. Jones*, 2 Camp. 131; *Broughton v. Blackman*, 1 D. Chip. 109; *State Bank v. Curran*, 10 Ark. 142; *Land v. Patteson, Minor (Alab.)*, 14.

It is otherwise as to such officers of the county, where the court sits, as come in official connection with the court.¹

§ 338. A court will also take judicial notice of the leading public events of its own country ;² and will permit works of history (though not by living authors) to be cited to this effect.³ Thus it has been held that a court will take notice of an ordinance of its own state abolishing slavery ;⁴ of the fact that a certain period was one of great business distress ;⁵ of leading public proclamations ;⁶ of the periods at which elections are held ;⁷ of the division of the Methodist Episcopal Church in 1844, into two churches, north and south ;⁸ of the suspension of specie payments ;⁹ of the existence of war ;¹⁰ of the nature of Confederate currency during the war ;¹¹ of the nature and limits of blockading during the civil war ;¹² of the closing of the courts in a particular county through civil war, and the substitution of military authority ;¹³ of the cessation of war.¹⁴ But notice will not be judicially taken of precise details of only local interest ;¹⁵ as,

¹ *Dyer v. Flint*, 21 Ill. 80 ; *Graham v. Anderson*, 42 Ill. 514 ; *Wether v. Dunn*, 32 Cal. 106 ; *Templeton v. Morgan*, 16 La. An. 438.

² *Weber*, Heffter's ed. 250 ; *Holman v. Burrow*, 2 Ld. Ray. 791 ; *R. v. Pringle*, 2 M. & Rob. 276 ; *Dolder v. Huntingfield*, 11 Ves. 292 ; *R. v. De Berenger*, 3 M. & S. 67 ; *U. S. v. Coin*, 1 Woolw. 217 ; *Ohio L. & T. Co. v. Debolt*, 16 How. 416 ; *Bank of Augusta v. Earle*, 13 Pet. 590 ; *Keyser v. Coe*, 37 Conn. 597 ; *Henthorn v. Shepherd*, 1 Blackf. 159 ; *Hart v. Bodley*, Hard. (Ky.) 98 ; *Bell v. Barnett*, 2 J. J. Marsh. 516 ; *Lewis v. Harris*, 31 Ala. 689 ; *Ferdinand v. State*, 39 Ala. 706 ; *Buford v. Tucker*, 44 Ala. 89 ; *Smith v. Speed*, 50 Ala. 276 ; *Ashley v. Martin*, 50 Ala. 537 ; *Lindsey v. Atty. Gen.* 33 Miss. 508 ; *Payne v. Treadwell*, 16 Cal. 220.

³ *Morris v. Harmer*, 7 Peters, 554. See *infra*, § 664 ; and see *McKinnon v. Bliss*, 21 N. Y. 206.

⁴ *Ferdinand v. State*, 39 Ala. 706.

⁵ *Ashley v. Martin*, 50 Ala. 537. See *infra*, § 948.

⁶ *Taylor v. Barelay*, 2 Sim. 213.

⁷ *Ellis v. Reddin*, 12 Kaus. 306.

⁸ *Humphrey v. Burnside*, 4 Bush, 215.

⁹ *U. S. v. Coin*, 1 Woolw. 217.

¹⁰ *R. v. De Berenger*, 3 M. & S. 67 ; *U. S. v. Ogden*, Trial of Smith & Ogden, 287 ; *Jones v. Walker*, 2 Paine, R. 697 ; *Cuyler v. Ferrill*, 1 Abb. U. S. 169 ; *Rice v. Shook*, 27 Ark. 137.

¹¹ *Buford v. Tucker*, 44 Ala. 89. *Infra*, § 948.

¹² *The Mersey Bl. Pr. Cas.* 187 ; *The William H. Northrop*, Bl. Pr. Cas. 235.

¹³ *Killebrew v. Murphy*, 3 Heisk. 546 ; *Gates v. Johnson Co.* 36 Tex. 144.

¹⁴ *U. S. v. Bales of Cotton*, 10 Int. Rev. Rec. 52.

¹⁵ *McKinnon v. Bliss*, 21 N. Y. 206 ; *Morris v. Edwards*, 1 Ohio, 189. See *Bishop v. Jones*, 28 Tex. 294 ; *Gregory v. Baugh*, 4 Rand. (Va.) 611.

In *The Minne*, Bl. Pr. Cas. 333, the

for instance, the exact local limit of the depreciation of Confederate currency;¹ or the position of the armies at particular periods of the war;² or the specific orders issued by a military commander.³

§ 339. A court is bound to take judicial notice of the leading geographical features of the land, the minuteness of the knowledge so expected being in inverse proportion to distance.⁴ Thus a court sitting in a particular city is bound to know the general scenery of such city, and its division into streets and wards;⁵ the courts of a particular state to know the boundaries of the state, and its division into towns and counties, and the limits of such divisions;⁶ and of its judicial districts;⁷ the position of leading cities and villages in such state;⁸ and the natural boundaries of the state.⁹ So it has been held in Wisconsin that the court would take notice that Prairie du Chien and McGregor are separated only by the Mississippi River; and that in the winter, when the river is frozen, these places are so contiguous as to make prices in them substantially the same.¹⁰ So the court of a state is expected to know judicially whether certain rivers in such state are navigable;¹¹

court went so far as to take judicial notice (without proof) that a particular shipper at Nassau was a notorious blockade runner.

¹ *Modawell v. Holmes*, 40 Ala. 391.

² *Kelley v. Story*, 6 Heisk. 202.

³ *Burke v. Miltenberger*, 19 Wall. 519.

⁴ See *U. S. v. La Vengeance*, 3 Dal. 297; *Peyroux v. Howard*, 7 Pet. 342.

⁵ *Montgomery v. Plank Road*, 31 Ala. 76. See *Money v. Turnipseed*, 50 Ala. 499.

⁶ *Harris v. O'Loughlin*, 5 Irish R. (Eq.) 514; *Whyte v. Rose*, 4 P. & D. 199; 3 Q. B. 495; *Deybel's case*, 4 B. & A. 242; *R. v. Isle of Ely*, 15 Q. B. 827; *R. v. Maurice*, 16 Q. B. 908; *Lyell v. Lapeer Co.* 6 McLean, 446; *U. S. v. Johnson*, 2 Sawyer, 482; *Buchanan v. Whitham*, 36 Ind. 257; *Goodwin v. Appleton*, 22 Me. 453; *Ham v. Ham*, 39 Me. 363; *Keyser v. Coe*, 37 Conn. 597; *Winnipiseogee*

Lake Co. v. Young, 40 N. H. 420; *State v. Powers*, 25 Conn. 48; *Commissioners v. Spitler*, 13 Ind. 235; *Buckinghouse v. Gregg*, 19 Ind. 401; *Hinckley v. Beckwith*, 23 Wisc. 328; *Wright v. Hawkins*, 28 Tex. 452; *Brown v. Elms*, 10 Humph. 135; *King v. Kent*, 29 Ala. 542.

⁷ *People v. Robinson*, 17 Cal. 363.

⁸ *Martin v. Martin*, 51 Me. 366; *Vanderwerker v. People*, 5 Wend. 530; *State v. Tootle*, 2 Harring. 541; *Indianapolis R. R. v. Case*, 15 Ind. 42; *Indianapolis R. R. v. Stephens*, 28 Ind. 429; *Harding v. Strong*, 42 Ill. 148; *Smitha v. Flournoy*, 47 Ala. 345; *Montgomery v. Plank Road*, 31 Ala. 76; though see *Kearney v. King*, 2 B. & A. 301.

⁹ *Price v. Page*, 24 Mo. 65; *Bell v. Barnett*, 2 J. J. Marsh. 516.

¹⁰ *Siegbert v. Stiles*, 39 Wisc. 533.

¹¹ *Neaderhouser v. State*, 28 Ind. 257.

and the general characteristics of the rivers traversing such state;¹ and of domestic tide waters in general.² But the distance from each other of places in the same county, and their actual boundaries, if essential, must be proved;³ and so must such subdivisions of counties as are established by municipal ordinance;⁴ and so must the time taken to travel from place to place;⁵ nor will judicial notice be taken of the fact that particular streets are in particular cities or counties, or in particular vicinities.⁶

§ 340. So a court is bound to take notice of the leading geographical features of foreign lands; remembering the caution already given, that the exactness required in such notice diminishes with distance.⁷ It is said, however, that the courts of one of the United States will not take judicial notice of the existence of the cities of another state;⁸ though this may be doubted, so far as concerns well known centres of business.⁹ Courts, also, may take judicial notice of the tidal character of rivers in foreign lands.¹⁰

Leading
foreign
geograph-
ical fea-
tures.

¹ *Cash v. Clark* Co. 7 Ind. 227; *Grant v. Moser*, 5 M. & Gr. 129; *Kir-Mossman v. Forrest*, 27 Ind. 233; by *v. Hickson*, 1 L., M. & P. 364.

Cummings v. Stone, 13 Mich. 70. In *Brune v. Thompson*, 2 Q. B. 789,

² *The Jefferson*, 10 Wheat. 428; the court went to the absurd extreme of nonsuiting the plaintiff because he

³ *Goodwin v. Appleton*, 22 Me. 433; *Fazakerley v. Wiltshire*, 1 Str. 469; *R. v. Burridge*, 3 P. Wms. 497; *Deybel's case*, 4 B. & A. 242; *Kirby v. Hickson*, 1 L., M. & P. 364.

⁴ *Bragg v. Rush* Co. 34 Ind. 406. ⁷ See *Richardson v. Williams*, 2 Porter (Ala.), 239.

⁵ *Rice v. Montgomery*, 4 Biss. 75; *Whitlock v. Castro*, 22 Tex. 108.

⁶ *R. v. Simpson*, 2 Ld. Ray. 1379; ⁸ *Riggin v. Collier*, 6 Mo. 568; *Woodward v. R. R.* 21 Wise. 309; *Whitlock v. Castro*, 22 Tex. 108.

⁹ *Rice v. Montgomery*, 4 Biss. 75. ¹⁰ *Whitney v. Gauche*, 11 La. An. 432; *The Peterhoff*, Blatch. Prize Cas. 463, in which the court (admiralty) went so far as to take notice of a bar in a foreign river which vessels of a specific draught could not cross.

CHAPTER VI.

INSPECTION.

<p>Inspection is a substitution of the eye for the ear in the reception of evidence, § 345.</p> <p>Is valuable when an ingredient of circumstantial evidence, § 346.</p>	<p>Not to be accepted when better evidence is to be had, § 347.</p> <p>Inspection of documents under order of the court, <i>infra</i>, § 745.</p>
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§ 345. INSPECTION is to be regarded rather as a means of dispensing with evidence, than as evidence itself. That which the court or jury sees need not be proved. The appearance of a defendant, for instance, so as to make up a basis of comparison in cases of identity, need not be proved by testimony, when the defendant appears in person at the trial. By the Romans this method of proof is frequently noticed.¹ By the glossarists the *evidentia facti* is spoken of as a *species probationis adeo clara, ut nihil magis, nec iudex aliud quam illam requirat*.² Under the title “*probatio per aspectum*,” it is mentioned as one of the most effective modes of conviction.³ Nor is it only the immediate object presented to the eye that is thus proved. Inferences naturally springing from such appearances are to be accepted; age, bodily strength, being thus inferred.⁴ Yet the inference is not to be regarded as certain, *nam aspectus facile decipit*.⁵ A footprint, inspected by the judge, is an *indicium*.⁶ Whether the court, at its own motion, could direct an inspection, or, as we call it, a view, was much discussed, and by the later practice, conceded.⁷ Inspection, it should be remem-

¹ See Cic. top. c. 2, § 29; L. 32 de minor. iv. 4; L. 3. Cod. fin. reg. iii. 39; Endemann, 82.

² See Masc. I. qu. 8.

³ Durant. II. 2, de prob. § 4, nr. 9, who extends proof by inspection to include the logical consequences of inspection — *e. g. ex eo quod clericus parvam habet filiam, probatur non diu continuisse*. See Endemann, 83.

⁴ Alciat. De praes. ii. 14, nr. 3; Menoch. De praes. ii. 50, nr. 38, 39.

⁵ Bart. Const. I. 92, nr. 3; Menoch. II. 51, nr. 61; Endemann, 83.

⁶ Masc. I. c. nr. 21.

⁷ See Endemann, 84; Schmid, p. 309, note 5; Seuffer, Archiv. IV. nr. 88.

bered, includes perception by any of the senses : *quae cerni tangi possunt* ;¹ though it was intimated, as a speculative opinion, *oculis major fides, quam auribus habenda*.²

§ 346. Where a thing is offered for the inspection of the court, it is obvious that in most cases this is primary evidence of such thing ; and proof by inspection is therefore received in preference to pictures or oral descriptions, whenever it is material to the jury to know what the thing is.³ The most common illustration of this principle is to be found in cases where juries are taken to view the scene where the events of the litigation occurred.⁴ So all instruments by which an offence is alleged to have been committed ; all clothes of parties concerned, from which inferences may be drawn ; all materials in any way part of the *res gestae* may be produced at the trial of the case.⁵ In questions of forgery, in particular, the production of the paper alleged to have been forged is an essential without which we can scarcely conceive of a case proceeding.⁶ Injury to the person may be so proved. Thus in an action to recover damages for an injury to a limb, the injured limb may be exhibited on trial, to be inspected by the court and jury, while the surgeon who was employed to set it testifies as to the injury.⁷ So in a North Carolina case,⁸ the defendant, who was charged with murder, set up as a defence that the deceased was accidentally burned to death, and that she (the defendant) burned her hands in trying to extinguish the fire. She was ordered by the coroner to show her hands, which ex-

Inspection
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an ingre-
dient of cir-
cumstan-
tial evi-
dence.

¹ Cic. top. c. 2, § 27.

² Hercul. De prob. neg. nr. 217 ; Endemann, 84. As to force of proof by inspection, see Ingram v. Plasket, 3 Blackf. 450.

³ See Ingram v. Plasket, 3 Blackf. 450. As to inspection of documents by jury, see Howell v. Ins. Co. 6 Biss. 436. See, however, supra, § 81.

⁴ See Whart. Cr. L. § 3160 ; Mossam v. Ivy, 10 How. St. Tr. 562 ; State v. Knapp, 45 N. H. 148 ; Ruloff v. People, 18 N. Y. 179 ; Eastward v. People, 3 Parker C. R. 25 ; Chute v. State, 19 Minn. 271 ; R. v. Martin,

L. R. 1 C. C. 378 ; State v. Bertin, 24 La. An. 46. Under the English statutes, see Stones v. Menhem, 2 Ex. R. 382 ; Morley v. Gaz. Co. 2 F. & F. 373.

⁵ See Whart. C. L. § 3468 *et seq.* See, also, La Beau v. People, 34 N. Y. 223 ; People v. Gonzales, 35 N. Y. 49 ; Gardner v. People, 6 Park. C. R. 155. As to notice to produce a dog, see Lewis v. Hartley, 7 C. & P. 405.

⁶ See infra, §§ 705, 711.

⁷ Mulhado v. R. R. 30 N. Y. 370.

⁸ State v. Garrett, 71 N. C. 85.

hibited no trace of burning. Evidence of this was received on trial. When the issue is infancy, on an indictment, the court and jury may decide by inspection.¹ On an issue of bastardy, the jury may judge of likeness by inspection;² and so on an issue of adultery, for the purpose of connecting a child with a putative father.³ It is inadmissible, however, to resort, in such issues, to the inspection of pictures.⁴ On an issue of pregnancy, a jury of matrons is empanelled to decide the issue by inspection.⁵ When comparison of hands is resorted to, the court, if not the jury, inspects the document as a mode of determining genuineness.⁶ Animals are sometimes brought into court when their identity or character is in controversy.⁷

§ 347. When, however, more exact proof can be produced, inspection does not afford a sufficient basis on which to rest a judgment. Thus in Indiana, where under a statute it was necessary to prove that the defendant was fourteen years old, it was held that in a case open to doubt, this proof must be, if possible, supplied by witnesses or records, and cannot be determined by inspection

Inspection
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dence could
be had.

¹ State v. Arnold, 13 Ired. L. 184.

² State v. Woodruff, 67 N. C. 89.

³ Stumm v. Hummel, 39 Iowa, 478.

⁴ Beers v. Jackman, 103 Mass. 192.

⁵ Baynton's case, 14 How. St. Tr. 630; R. v. Wycherly, 8 C. & P. 262.

⁶ Infra, § 711 *et seq.*

⁷ Line v. Taylor, 3 F. & F. 731; Wood v. Peel, cited Taylor's Ev. § 500, Lewis v. Hartley, 7 C. & P. 405. In an English case passing through the English daily papers in the spring of 1876: "Mrs. Priscilla Wolfe, a widow lady of independent means, residing at Kilsby, near Rugby, sued Richard Jones, butcher, of the same place, for £5 damages, for illegally killing a cockatoo parrot belonging to the plaintiff. The defence was that the defendant shot the cockatoo mistaking it for an owl. The fellow-bird of the deceased cockatoo was brought into court, and afforded great amusement

by strongly recommending the parties to 'Shake hands,' 'Shut up,' and asking for 'sugar.'" In Brown v. Foster, 113 Mass. 136, the action was by a tailor to recover the price of a suit of clothes which he had made, and guaranteed to be "satisfactory." The defendant pronounced them unsatisfactory, and returned them. They were produced in court, and at the plaintiff's request the defendant put them on and exhibited them to the jury. On the part of the plaintiff it was claimed that they needed only a few trifling alterations, which he was willing to make, but that the defendant had refused to allow them. Evidence was received of a custom among tailors of having garments tried on after they were finished, and then making necessary alterations. A new trial was granted on account of the reception of this evidence.

alone.¹ But it is one of the necessary incidents of the bringing into court of the instruments by which an act is alleged to have been done, that such instruments should be tested in open court. It is only when this is done by the jury, after retiring, when the parties have no opportunity of revising the process, that objection can be made. When the process is conducted openly, as part of the trial of the case, it is a valuable auxiliary in the discovery of truth.²

¹ *Stephenson v. State*, 28 Ind. 272.

In a suit for injury to chattels, the plaintiff, it has been ruled in Maryland, is not entitled to produce the chattel in court in order to prove the injury by inspection. The injury, it has been said, must be proved by witnesses. *Jacobs v. Davis*, 34 Md. 204. So it is said in North Carolina that the qualities of a stallion for foal-getting cannot be judged by inspection, but may be proved by reputation. *McMillan v. Davis*, 66 N. C. 539.

In Tennessee, in a case reported in 1860, *Stokes v. State*, Alb. L. J. May 6, 1876, where the prisoner was indicted for the murder of a female by hanging, the evidence was, that, near the place where she was hanged, a track was found in the mud, made by a bare foot. The prosecution sought to show that this track was made by the foot of the prisoner, and brought a pan of mud into court and placed it before the jury; it being proved that the mud was about as soft as the mud where the track was seen. The prisoner was then called upon by the prosecuting attorney to put his foot in the mud, but refused. The defendant was convicted, but the court on appeal reversed the finding, on the ground that the circumstance had an influence on the jury prejudicial to the prisoner. The court said: "Such testimony should be promptly rejected, and not permitted to go to the jury at all, for jurors with minds untrained to legal investigations and discriminations are

sometimes likely to be influenced thereby, although such incompetent evidence may be afterward withdrawn."

Experiments not applicable to conditions existing on the trial cannot be proved by experts. *Hawks v. Charlemont*, 110 Mass. 110; *Com. v. Piper*, 120 Mass. 185.

In patent cases, it should be remembered, experiments before the jury are constantly resorted to.

Whether a witness can be called upon to write his name in court, on questions of identity of hands, is elsewhere considered. *Infra*, § 706.

² The late Rev. F. W. Robertson, in a letter printed by his biographer (*Life and Letters of F. W. Robertson*, ii. 139), gives the following vivid sketch of a trial before Sir John Jervis: "One was a very curious one, in which a young man of large property had been fleeced by a gang of black-legs on the turf, and at cards. Nothing could exceed the masterly way in which Sir John Jervis untwined the web of sophistries with which a very clever counsel had bewildered the jury. A private note-book, with initials for names, and complicated gambling accounts, was found on one of the prisoners. No one seemed to be able to make head or tail of it. The chief justice looked it over and most ingeniously explained it all to the jury. Then there was a pack of cards which had been pronounced by the London detectives to be a perfectly fair pack.

'They were examined in court; every one thought them to be so, and no stress was laid upon the circumstance. However, they were handed to the chief justice. I saw his keen eye glance very inquiringly over them while the evidence was going on. However, he said nothing, and quietly put them aside. When the trial was over, and the charge began, he went over all the circumstances till he got to the objects found upon the prisoners. 'Gentlemen,' said he, 'I will engage to tell you, without looking at the faces, the name of every card upon this pack!' A strong exclamation of surprise went through the court. The prisoners looked aghast. He then pointed out that on the backs, which were figured with wreaths and flowers in dotted lines all over, there was a

small flower in the right-hand corner of each like this:



"The number of dots in this flower was the same on all the kings, and so on, in every card through the pack. A knave would be perhaps marked thus: An ace thus: . . . and so on; the difference being so slight, and the flowers on the back so many, that even if you had been told the general principle, it would have taken a considerable time to find out which was the particular flower which differed. He told me afterwards that he recollected a similar expedient in Lord De Ros's case, and therefore set to work to discover the trick. But he did it while the evidence was going on, which he himself had to take down in writing."

CHAPTER VII.

BURDEN OF PROOF.

Prevalent theory is that burden of proof is on affirmative, § 353.	In a contract against bailees, it is sufficient to prove bailment, § 364.
True view is that burden is on party undertaking to prove a point, § 354.	Burden of proving <i>casus</i> is on party setting it up, § 365.
Roman law is to this effect, § 355.	Burden is on party assailing good faith or legality, § 366.
Negatives are susceptible of proof, § 356.	Burden is on party to prove that which it is his duty to prove, § 367.
Burden is properly on actor, § 357.	License to be proved to whom such proof is essential, § 368.
Party who sets up another's tort must prove it, § 358.	Burden of proving formalities is on him to whom it is essential, § 369.
So as to negligence, § 359.	Importance of question as to burden, § 370.
So in suit against railroad for <i>firing</i> , § 360.	Court may instruct jury that a presumption of fact makes a <i>prima facie</i> case, § 371.
Contributory negligence to be proved by defence, § 361.	
In a suit of non-performance of contract, plaintiff must prove non-performance, § 362.	
Rule altered when plaintiff sues in tort, § 363.	

§ 353. IN the trial of a judicial issue, the first point to be determined is, by whom is the evidence in the case to be offered, and to what extent must this evidence proceed. Various theories on this point have been advanced. That which in England is generally accepted is, that on the party maintaining the affirmative the burden is always imposed. Among the most authoritative exponents of this view is Mr. Best, in his treatise on Evidence.¹ "The general rule," he declares, "is, that the burden of proof lies on the party who asserts the affirmative of the issue, or question in dispute, — according to the maxim, *Ei incumbit probatio qui dicit, non qui negat* ; and to this effect he cites Mr. Starkie and Mr. Phillipps, sustaining his views by a copious exposition.² A distinguished German jurist and statesman,

Prevalent theory is that the burden is on the affirmative.

¹ Best's Evidence, 5th ed. 369.

² See, to same effect, *Phelps v. Hartwell*, 1 Mass. 71 ; *Phillips v. Ford*, 9

Pick, 39 ; *Costigan v. R. R.* 2 Denio, 609 ; *Pusey v. Wright*, 31 Penn. St. 387 ; *Nash v. Hall*, 1 Ind. 444 ; *Me-*

Bethman-Hollweg, has given his adhesion to the same view.¹ The question of the burden of proof, he argues, is not confined to merely juridical relations. We will not err, therefore, if in such a discussion we turn for illustration to the analogies of ordinary life. How is it, for instance, in a controversy as to a historical fact, or a natural phenomenon? When a third person asserts such fact or phenomenon, on such person, we declare, lies the burden of proof, if the assertion be denied. We refuse assent until proof of the truth of the assertion is brought. This, however, is identical with the rule that he who affirms, not he who denies, must prove. It is true that this is not applicable to many cases; as, for instance, where there is a double hypothesis, of which the first party asserts one alternative and the second party asserts the other alternative. But by such case, as on neither party lies a burden of proof, the rule as above given is not affected. In the relations of common life, therefore, we apply the rule, *Affirmanti incumbit probatio, non neganti*. It is true, he proceeds to say, that we dispense practically with this rule in common life in cases where there is not a direct issue of affirmation or denial. But this is not the case in civil process, where such an issue always exists, for in such case one party necessarily claims a right which another resists. Whoever claims a right, affirms such right, and must prove it, for the reason that it cannot be admitted by the judge without proof.

§ 354. But to this it has been well replied,² that the very exception made by Bethman-Hollweg shows that the rule he advocates can have only a limited application to judicial investigations. He admits that the rule does not apply when there are two or more conflicting interests; but rare are the litigated issues in which two or more interests do not conflict. Nor is this all. In many cases each party unites, with an affirmation on his part of his own rights, a denial of the rights of his opponent; and the affirmation and denial are so blended as to be incapable

Correct view is that the burden is on a party undertaking to prove a point.

Clure v. Pursell, 6 Ind. 330; Stevenson v. Marony, 29 Ill. 532; Grims v. Tidmore, 8 Ala. 746; Kyle v. Calmes, 1 How. (Miss.) 121; Thompson v. Lee, 8 Cal. 275; People v. Murray, 41 Cal.

66. So, also, Greenleaf's Ev. § 74, and Taylor's Ev. § 837.

¹ Versuche, p. 337.

² Heflter, Appendix to Weber, 259.

of severance in proof. Nor can we agree that the investigations of common life can give a rule decisive of those in a court of justice. Every trial is a public contest, in which a litigant appears to advance a right. If this right is denied by an opponent, then the decision is referred to a court duly constituted as the organ of the state. The court, when the case comes before it, is bound to know nothing as to the merits of the issue, and must, therefore, before a decision be made, be advised as to such merits by the party making such claim, whether the claim consist in establishing a right for himself, or in releasing himself from the right of another. On the party putting forth such right this duty is incumbent. *Jura socordibus non succurrent.* The defendant, on the other hand, seeks to relieve himself from the plaintiff's case, either by a direct traverse, *inficiatione*, or through a plea of avoidance, in which he sets up a conflicting claim to bar the plaintiff's demand. If he take this second attitude, he is in the same attitude as the plaintiff; and he must assume the burden of proof in making good his defence. Whenever, whether in plea, or replication, or rejoinder, or surrejoinder, an issue of fact is reached, then, whether the party claiming the judgment of the court asserts an affirmative or negative proposition, he must make good his assertion. On him lies the burden of proof.¹

§ 355. The conclusion thus announced is affirmed in more than one emphatic ruling of the Roman jurists, when dealing with this very topic. *Semper necessitas probandi incumbit illi qui agit.*² Whoever undertakes the office of advancing a claim, whether that claim be maintenance or release, must make good his case. A defendant, who seeks to relieve himself from the established right of another, is in this respect in the same position as the plaintiff, by whom a right is to be established. *Reus excipiendo fit actor.* So far as concerns pleas (*exceptionibus*), Ulpian tells us³ that the defend-

Roman law is to this effect.

¹ Thus, as we will presently see more fully, when the defendant in an action of debt pleads payment, the burden is on himself; when he pleads *non est factum*, the burden is on the

plaintiff. *West v. Irwin*, 74 Penn. St. 258.

² L. 21, D. de probat. See same point in L. 19, pr. L. 21, C. de probat; L. 9, C. de except.

³ L. 19, D. de probat. xxii. 3.

ant may take the part of the actor, in which case he must prove his claim ; *e. g.* if he sets up a countervailing contract (*pactum conventum*), he must prove that such contract was actually executed. Celsus¹ applies the rule as follows : A legacy of five hundred gold pieces is left to you, and to the same will is attached a codicil giving you the same amount. The question arises whether the testator meant to double the amount, or only to affirm in the codicil that which he had forgotten he had stated in the body of the will. On which party, the legatee or the representatives of the testator, in a suit for the double sum, is the burden of proof ? At the first view, so concludes Celsus, it seems more equitable (*aequius*) that the burden should be on the legatee, to make good his claim. But if there be avoiding evidence, this must be adduced by the defendant. If, for instance, I sue for money lent, and the defendant answers that the money has been paid back, this defence it is incumbent on him to prove (*ipse hoc probare eogendus est*). In the case of the will before us, therefore, if the plaintiff proves both will and codicil, and the defendant undertakes to show the codicil is inoperative, the burden is on him to prove this to the court. The theory of the Roman law in this relation is, that the part of an *actor* is undertaken only by him whose rights are either denied or doubted. In this category falls not only the plaintiff, who claims a right, but the defendant, who undertakes to defeat by his own claim another's right ; and it is incumbent therefore on the latter, *Exceptionem velut intentionem implere*.² On the other hand, the *reus*, or defendant, who quietly and silently waits the plaintiff's attack, interposing only a plea in bar, has no burden in respect to proof. *Actore non probante, qui convenitur, etsi nihil ipse praestiterit, obtinebit*.³ So far as concerns the Roman maxim, on which Mr. Best, and those whom he cites, rely as of first authority, little need be said. *Ei incumbit probatio qui dicit, non qui negat*, is undoubtedly of classical origin ;⁴ and with this may be coupled, *Negantis naturali ratione nulla est probatio*.⁵ But to affirm that these maxims were set forth as containing a correct theory as to the burden of proof, is to affirm, as Heffter remarks,⁶

¹ L. 12, *id.*² L. 19, *pr. D. id.*³ L. 4, C. de edendo. ii. 1.⁴ L. 2, D. de probat.⁵ L. 23, C. eod. iv. 19.⁶ Weber, Heffter's App. 264.

that the jurists, on a question of high importance, to which they gave peculiar thought, announced two theories in direct conflict. We must, therefore, treat the maxim, *Ei incumbit probatio qui dicit, non qui negat*, as equivalent to *Actori incumbit probatio*, and if we do not subordinate the second maxim to the first, we must subordinate the first to the second. That the jurists regarded the first maxim simply as a formal variation of the second, there is good exegetical reason to assert. *Dicere*, like *adseverare*,¹ may well mean, to *claim*.²

§ 356. It is asserted, in defence of the rule here contested, that a negation cannot be proved, and hence, as only an affirmation is provable, on the affirming party alone can rest the burden of proving. To this the following qualifications may be made: The inquiry is, not for mathematical certainty, but for such probability, higher or lower, as is obtainable in judicial proceeding. High probability is the best we can obtain in any case; high probability may be reached as to the non-existence of many things which are claimed to exist. Arguments drawn from non-juridical fields do not here apply. It may be difficult for me to prove that a thing does not exist in all space, or that certain occult intents may not lurk in the undisclosed recesses of a particular person's heart. But jurisprudence has to do with no such vague domains. Its territory is limited. It inquires whether, in a particular spot, at a particular time, open to human observation, a particular thing existed; or whether, by the small range of witnesses to whom a party at a particular time was visible, he gave signs of the suspected intent. It is possible, within such limited range, to call all witnesses who were likely to have been at the given spot, or observed the given person, at the particular time, and so to approach a negative by gradually exhausting the affirmative. In fact, as is well argued,³ what is counter-proof, in most cases (*c. g.* in an

¹ See L. 19, C. de probat.

² See authorities to this point in Heffter's App. to Weber, 265.

³ See Meier, Colleg. Argent. tit. de prob. § 7; Weber, Heffter's ed. 135.

So in the following well known passage by Archbishop Whately:—

“Contradictory opposition” is the

kind most frequently alluded to, because (as is evident from what has been just said) to *deny*—or to *disbelieve*—a proposition is to *assert*, or to *believe*, its contradictory; and, of course, to *assent* to, or *maintain* a proposition, is to *reject* its contradictory. Belief, therefore, and disbelief,

alibi), but proof of a negation? We may prove a negative indirectly, by proving conditions incompatible with the alleged fact, showing, for instance, that a party charged was in another place than that necessary to the plaintiff's case; or we may do it directly, by calling a witness present at the latter place, and proving that the defendant was not there. So, also, where a plaintiff sues for a debt; if the defendant can produce an admission from the plaintiff that the debt was never incurred, this is proving a negative, but a negative, which, if believed, will defeat the plaintiff's case. How often is the question put, "Could such a thing have been done without your seeing it," and how conclusive has sometimes been held a negation based upon the hypothesis that without the witness seeing an event it could not have happened. In actions for malicious prosecution, if the plaintiff does not in some way approach to proof of a negation of his guilt, his case is not made.¹ So, to take one more illustration: Suppose upon a suit by A. against B., B. sets up as a defence that A. is dead, how is B. to prove such defence in cases in which A.,

are not *two different* states of the mind, but the *same*, only considered in reference to two contradictory propositions. And, consequently, *credulity* and *incredulity* are not opposite habits, but the same; in reference to some class of propositions, and to their contradictions.

"For instance, he who is the most *incredulous* respecting a certain person's *guilt* is, in other words, the most ready to believe him *not guilty*; he who is the most credulous as to certain works being within the reach of magic, is the most incredulous (or 'slow of heart to believe') that they are *not* within the reach of magic; and so in all cases.

"The reverse of *believing this or that individual* proposition is, no doubt, to *disbelieve that same* proposition; but the reverse of *belief, generally*, is not disbelief; since that implies belief; but *doubt*.

"And there may even be cases in

which *doubt* itself may amount to the most extravagant credulity. For instance, if any one should 'doubt whether there is any such country as Egypt,' he would be in fact *believing* this most incredible proposition; that 'it is *possible* for many thousands of persons, unconnected with each other, to have agreed, for successive ages, in bearing witness to the existence of a fictitious country, without being detected, contradicted, or suspected.'" Whately's *Logic*, book ii. chap. ii. § 3.

¹ The plaintiff must show that the proceeding was entirely groundless, and it is not sufficient for him to prove the dismissal of the charge. Per the Judicial Committee of the Privy Council, *Baboo Gunesh Dutt v. Mugneeram Chowdry*, 11 Beng. L. R. 321; *Powell's Evidence*, 4th ed. 291; *Ames v. Snider*, 69 Ill. 376; *Mitchell v. Jenkins*, 5 B. & A. 588; *Porter v. Weston*, 5 Bing. N. C. 715.

if he were living, would be over one hundred years old? If A. had died fifty years back, it might be difficult to find witnesses who saw him die, and the best that the defendant could do would be to prove that A. had not for years been seen or heard of alive. If we did not rely on negative proof, or on negative presumptions, which are the same thing, those who died out of the memory of man would have to be juridically treated as permanently alive.¹

¹ In support of the proposition that wherever the plaintiff bases his action on a negative allegation, the burden is on him to prove such allegation, see *Doe v. Johnson*, 7 M. & Gr. 1047, 1060; *Mills v. Barber*, 1 M. & W. 425; *Elkin v. Janson*, 13 M. & W. 655; *Fitch v. Jones*, 5 E. & B. 238; *Com. v. Bradford*, 9 Mete. 268; *Central Bridge Co. v. Butler*, 2 Gray, 130; *Com. v. Locke*, 114 Mass. 288; *Baldwin v. Buffalo*, 35 N. Y. 375; *Strickler v. Burkholder*, 47 Penn. St. 476; *Barton v. Sutherland*, 5 Rich. 57; *Conyers v. State*, 50 Ga. 103; *Adams v. Field*, 25 Mich. 16; *Persons v. McKibben*, 5 Ind. 261; *West v. State*, 48 Ind. 483; *Duffield v. Delancey*, 36 Ill. 258; *Beardstown v. Virginia*, 76 Ill. 44; *Kerr v. Freeman*, 33 Miss. 202.

In all suits brought for failures on part of a carrier, the plaintiff begins by proving or inferring a negative; *i. e.* that the goods were not delivered. See *infra*, § 362.

So, also, the party making the allegation is bound to prove that certain goods were not legally imported; *Sissons v. Dixon*, 5 B. & C. 758; and that a certain theatre is not duly licensed; *Rodwell v. Redge*, 1 C. & P. 220; or that certain essential notice was not given. *Williams v. E. Ind. Co.* 3 East, 193.

The following may be of use as additional illustrations of the proposition of the text, that a negative allegation must be proved by the party

making it, whenever such allegation is essential to such party's case.

Where in an action against a tenant the breach assigned is that the premises were not kept in repair, and this allegation be traversed by the plea, the plaintiff must prove his negative averment. *Soward v. Leggatt*, 7 C. & P. 613; *Doe v. Rowlands*, 9 C. & P. 734, per Coleridge, J.; *Belcher v. M'Intosh*, 8 C. & P. 720, per Alderson, B. For though according to the grammatical construction of the issue, the affirmative lies on the defendant, yet the substantial merits of the case must be proved by the plaintiff; and if no evidence were given, or if the allegation on which issue was joined were struck from the record, the defendant would clearly be entitled to a verdict. *Taylor's Ev.* § 338.

It has been also ruled that where the plaintiff, in an action on a life policy, after averring that the insurance was effected on a statement made by the plaintiff, that the insured was not subject to habits or attacks of illness tending to shorten life, but was in good health, — should proceed to aver that this statement was true, and the defendant were to plead that it was false in these respects; that the insured was subject to habits and attacks tending to shorten life, to wit, habits of intemperance and attacks of erysipelas, and was ill at the time the statement was made, — in such case the burden of proof would lie upon the plaintiff, though the plea should con-

The true solution of the question is that which has been stated, — that he who in a court of justice undertakes to establish a

clude with a verification, and be met by a replication offering a general denial; because to entitle the plaintiff to a verdict, some evidence must be given to show that, at the time when the policy was effected, the life was insurable. *Huckman v. Fornie*, 3 M. & W. 505, 510; *Ashby v. Bates*, 15 M. & W. 589; 4 Dowl. & R. 33, S. C.; *Geach v. Ingall*, 14 M. & W. 95; *Rawlins v. Desborough*, 2 M. & Rob. 70, per Ld. Denman; 8 C. & P. 321, S. C.; *Craig v. Fenn*, C. & Marsh. 43, per *Ibid.* See *Poole v. Rogers*, 2 M. & Rob. 287.

As we have seen, non-license of a theatre, when averred, must be proved. *Rodwell v. Redge*, 1 C. & P. 229. *Infra*, § 368.

It has been further ruled that the underwriter, in an action on a marine policy, who sets up that certain material facts, known to the assured, had been concealed from him, has on him the burden of proving the non-communication of these facts, on a replication traversing the whole plea; for although the allegation contained in his plea may be negative in its terms, still, as it was the duty of the assured to make the communication, — either upon the principle that every policy is based on the supposed existence of a certain state of facts, or on the ground that insurance is a contract *uberrimae fidei*, — some evidence should be given by the underwriter to rebut the presumption that the assured had discharged his duty. The amount of the proof required will, indeed, vary according to the circumstances of the case, and very slender evidence will often be sufficient; for suppose a ship was known by the assured to have been burned at the time when the assurance was effected, proof of this

fact would in itself be reasonable evidence to show that it had not been communicated, because no underwriter in his senses, had he been aware of such a circumstance, would have executed the policy. *Elkin v. Janson*, 13 M. & W. 655, 663, 665, per Parke and Alderson, BB.; *Taylor's Ev.* § 339.

So, to meet another of Mr. Taylor's illustrations, where a plaintiff avers that A. was, at a specified time, of sound mind, and this averment is traversed by the defendant, the latter is bound to prove the negative allegation of incompetency, because every man may reasonably be presumed to be sane till the contrary is shown, and consequently, this presumption of fact, in the absence of evidence to the contrary, would equally serve the plaintiff's purpose, as though he had given express evidence of the sanity. See *Sutton v. Sadler*, 26 L. J. C. P. 284; 3 Com. B. N. S. 87, S. C.; *Dyce Sombre v. Troup*, 1 Deane Ec. R. 38, 49. On the other hand, if such an issue were to come from the court of chancery, it is held that the plaintiff would be called upon to prove the sanity of the party, because the court in such case would presume that the judge directing the issue had considered that a *prima facie* case of madness had been made out, and by ordering the party who relied upon the sanity to be the plaintiff, had intended that the burden of proof should devolve upon him. *Frank v. Frank*, 2 M. & Rob. 314. See fully *infra*, § 1252.

A failure to comply with the uniformity statutes, under the old law, if alleged, must be proved. *Powell v. Milburn*, 5 B. & C. 758. See *R. v. Hawkins*, 10 East, 216; S. C. Dom. Proc. 2 Dow, 124.

claim against another, or to set up a release from another's claim against himself, must produce the proof necessary to make

If to an action brought by an indorsee against the acceptor of a bill of exchange, the defendant plead that the bill was accepted by him for the accommodation of the drawer, and was indorsed to the plaintiff without value, and the plaintiff reply that it was indorsed to him for a valuable consideration, the burden of proving this issue will be on the defendant, because the mere possession of the bill raises a *prima facie* presumption of due consideration having been given for it. *Mills v. Barber*, 1 M. & W. 425; *Tyr. & Gr.* 835; 5 Dowl. 77. *S. C.*; *Whittaker v. Edmunds*, 1 M. & Rob. 366, per Patteson, J.; *Fitch v. Jones*, 5 E. & B. 238.

So, in a case already frequently cited, where a defendant was charged, in an action on the case, with a failure to give notice to the ship's officers of certain explosive compounds delivered by him to them, which resulted in the burning of the ship, it was held that, as the omission to give notice would have been a criminal neglect of duty on the part of the defendant, the law presumed that notice had been given, and threw upon the plaintiff the burden of proving the negative. *Williams v. E. India Co.* 3 East, 192.

It is also ruled that an omission to insure must be proved by a plaintiff, in an action by a landlord against a tenant, based on such omission. See *Toleman v. Portbury*, 39 L. J. Q. B. 136, per Ex. Ch. Had the landlord, it is said, wished to have been relieved from the necessity of establishing this negative proof, he might easily have inserted a clause to that effect in the lease. *Doe v. Whitehead*, 8 A. & E. 571.

Where, also, to a suit for not exe-

cuting a contract in a workmanlike manner, the defendant pleads that the work was properly done; *Amos v. Hughes*, 1 M. & Rob. 464; or where a declaration alleges that a horse sold under a warranty was unsound, and this fact be traversed by the plea; *Osborn v. Thompson*, 9 C. & P. 337, per Erskine, J.; 2 M. & Rob. 254, *S. C.*; *Cox v. Walker*, cited 9 C. & P. 339, per Ld. Denman; *S. P.*, ruled per Tindal, C. J., as cited *Ibid.* 338; the *onus*, in either case, will lie on the plaintiff, and the same rule will prevail in an action brought against an attorney for not using due diligence; *Shilcock v. Passman*, 7 C. & P. 291, per Alderson, B.; or against a merchant for not loading a sufficient cargo on board a ship, pursuant to a charter party; *Ridgway v. Ewbank*, 2 M. & Rob. 217, per Alderson, B.; or against an architect for not building houses according to a specification. *Smith v. Davies*, 7 C. & P. 307, per Alderson, B.

Were a defendant to plead that he had accepted the bill for his own accommodation, and that the drawer, instead of getting it discounted for the use of the defendant, had indorsed it to a stranger, who had fraudulently indorsed it to the plaintiff, after it became due, or without consideration, and the plaintiff were to traverse this last allegation, the burden of proving that the bill was overdue at the time of indorsement, or that no value was given for it by the holder, would devolve on the defendant, because the plea does not contain such an allegation of fraud as would counteract the presumption arising from the possession of the instrument. *Lewis v. Parker*, 4 A. & E. 838; *Jacob v. Hungate*, 1 M. & Rob. 445, per Parke, B.;

good his contention. This proof may be either affirmative or negative. Whatever it is, it must be produced by the party who seeks forensically either to establish or to defeat a claim.

§ 357. It makes no difference, therefore, whether the actor is plaintiff or defendant, so far as concerns the burden of proof. If he undertake to make out a case, whether affirmative or negative, this case must be made out by him, or judgment must go against him. Hence it may be stated, as a test admitting of universal application, that whether the proposition be affirmative or negative, the party against whom judgment would be given, as to a particular issue, supposing no proof to be offered on either side, has on him, whether he be plaintiff or defendant, the burden of proof, which he must satisfactorily sustain.¹ If there is a case made out against a defend-

Brown v. Philpot, 2 *Ibid.* 285, per *Ld. Denman*. In this last case the replication was *de injuriâ*. See, also, *Smith v. Martin, C. & Marsh.* 58; *Taylor's Ev.* § 340.

¹ *Amos v. Hughes*, 1 *M. & Rob.* 464; *Doe v. Rowlands*, 9 *C. & P.* 735; *Osborn v. Thompson*, 9 *C. & P.* 337; *Ridgway v. Ewbank*, 2 *M. & Rob.* 218; *Huckman v. Firnie*, 3 *M. & W.* 505; *Elkin v. Janson*, 13 *M. & W.* 655; *Geach v. Ingall*, 14 *M. & W.* 97; *Ashby v. Bates*, 15 *M. & W.* 589; *Sutton v. Sadler*, 3 *C. B. (N. S.)* 87; *Bradley v. McKee*, 5 *Cranch C. C.* 298; *Prevost v. Gratz*, 6 *Wheat.* 481; *Huchberger v. Ins. Co.* 5 *Bissel*, 106; *Hankin v. Squires*, 5 *Bissel*, 186; *Fullerton v. Bank U. S.* 1 *Pet.* 607; *Mellon v. Crofton*, 6 *Me.* 308; *New Haven Co. v. Brown*, 46 *Me.* 418; *Shackford v. Newington*, 46 *N. H.* 415; *Kendall v. Brownson*, 47 *N. H.* 186; *Gilmore v. Wilbur*, 18 *Pick.* 517; *Beals v. Merriam*, 11 *Metc. (Mass.)* 470; *St. John v. R. R.* 1 *Allen*, 544; *Pratt v. Lamson*, 6 *Allen*, 457; *Broaders v. Toomey*, 9 *Allen*, 65; *Central Bridge v. Butler*, 2 *Gray*, 130; *Dorr v. Fisher*, 1 *Cush.* 227; *Morgan v. Morse*, 13 *Gray*, 150; *Pratt v. Langdon*, 97

Mass. 97; *Gay v. Southworth*, 113 *Mass.* 333; *New Bedford v. Hingham*, 117 *Mass.* 445; *Parsons v. Topliff*, 119 *Mass.* 245; *Funccheon v. Harvey*, 119 *Mass.* 469; *Cotheal v. Talmadge*, 1 *E. D. Smith*, 573; *Heinemann v. Heard*, 62 *N. Y.* 448; *Zerbe v. Miller*, 16 *Penn. St.* 488; *Pittsburg R. R. v. Rose*, 74 *Penn. St.* 362; *Briceland v. Com.* 74 *Penn. St.* 463; *Reeve v. Ins. Co.* 39 *Wise.* 520; *State v. McGinley*, 4 *Ind.* 7; *Spaulding v. Harvey*, 7 *Ind.* 429; *Kent v. White*, 27 *Ind.* 390; *Milk v. Moore*, 39 *Ill.* 584; *Maltman v. Williamson*, 69 *Ill.* 423; *Hyde v. Heath*, 75 *Ill.* 381; *Woodruff v. Thurlby*, 39 *Iowa*, 344; *Veiths v. Hagge*, 8 *Iowa*, 163; *Grimmell v. Warner*, 21 *Iowa*, 11; *Burton v. Mason*, 26 *Iowa*, 392; *Day v. Raguett*, 14 *Minn.* 273; *Johnson v. Gorman*, 30 *Ga.* 612; *Shulman v. Brantley*, 50 *Ala.* 81; *Hill v. Nichols*, 50 *Ala.* 336; *Stoddard v. Kelly*, 50 *Ala.* 453; *Brandon v. Cabiness*, 10 *Ala.* 155; *Craig v. Perois*, 14 *Rich. Eq.* 150; *Carver v. Harris*, 19 *La. An.* 621; *Fox v. Hilliard*, 35 *Miss.* 160; *Richardson v. George*, 34 *Mo.* 104; *Church v. Fagin*, 43 *Mo.* 123; *Gatewood v. Bolton*, 48 *Mo.* 78; *Henderson v.*

ant, on which, if the plaintiff should close, a judgment would be sustained against the defendant, then the defendant has on him the burden of proving a case by which the plaintiff's case will be defeated.¹ Thus if a defendant answers to a contract made by him, that he acted therein exclusively as agent for another, the burden is on him to prove such agency;² and so if he set up non-joinder by plea in abatement;³ and so if he set up a prior conviction or acquittal;⁴ and so if he set up accord and satisfaction;⁵ and so if he set up confession and avoidance;⁶ and so if he set up illegality under the stock-jobbing act;⁷ or illegality under the liquor acts;⁸ and so if he set up usury;⁹ or other illegality or fraud;¹⁰ and so if he set up payment;¹¹ and so if, to a note, he set up failure of consideration.¹² So the burden is on a

State, 14 Tex. 503; *Mills v. Johnston*, 23 Tex. 308; *Luckhart v. Ogden*, 30 Cal. 547. This rule applies to claimants in forfeiture cases. *The Short Staple*, 1 Gall. 104; *The Argo*, 1 Gall. 150; *U. S. v. Hayward*, 2 Gall. 499.

¹ *Treadwell v. Joseph*, 1 Sumn. 390; *Railroad Co. v. Gladmon*, 15 Wall. 401; *Briggs v. Taylor*, 28 Vt. 180; *Gray v. Gardner*, 17 Mass. 188; *Davis v. Jenney*, 1 Mete. 221; *Attleboro v. Middleboro*, 10 Pick. 378; *Com. v. Daley*, 4 Gray, 209; *Lewis v. Smith*, 107 Mass. 334; *Wolcott v. Holcomb*, 31 N. Y. 125; *Sullivan v. R. R.* 30 Penn. St. 234; *Empire Trans. Co. v. Wamsutta Co.* 63 Penn. St. 17; *Zerhe v. Miller*, 16 Penn. St. 488; *Winans v. Winans*, 19 N. J. Eq. 220; *Freeh v. R. R.* 39 Md. 574; *Gough v. Crane*, 3 Md. Ch. 119; *Peck v. Hunter*, 7 Ind. 295; *Kent v. White*, 27 Ind. 390; *Southworth v. Hoag*, 42 Ill. 446; *Adams Ex. Co. v. Stettaners*, 61 Ill. 184; *Hale v. Hazelton*, 21 Wise. 620; *Castello v. Landwehr*, 28 Wise. 522; *Ketchum v. Ex. Co.* 52 Mo. 390; *Zemp v. Wilmington*, 9 Rich. L. 84; *Steele v. Townsend*, 37 Ala. 247; *Peck v. Chapman*, 16 La. An. 366; *Hutchins v. Hamilton*, 34 Tex. 290.

² *Whart. on Agen.* § 491; *Vawter v. Baker*, 23 Ind. 63; *Winans v. Winans*, 19 N. J. Eq. 220.

³ *Jewett v. Davis*, 6 N. H. 518.

⁴ *Whart. Cr. L.* § 568; *Com. v. Daley*, 4 Gray, 209.

⁵ *American v. Rimpert*, 75 Ill. 228.

⁶ *Gray v. Gardner*, 17 Mass. 188; *Davis v. Jenney*, 1 Mete. (Mass.) 221; *Attleboro v. Middleboro*, 10 Pick. 378; *Peck v. Hunter*, 7 Ind. 295.

⁷ *Dykens v. Townsend*, 24 N. Y. 57.

⁸ *Trott v. Irish*, 1 Allen, 481.

⁹ *Cutler v. Wright*, 22 N. Y. 472; *Thomas v. Murray*, 32 N. Y. 605; *Davis v. Bowling*, 19 Mo. 651.

¹⁰ *Dalrymple v. Hillenbrand*, 62 N. Y. 5; *Feldman v. Gamble*, 26 N. J. Eq. 494.

¹¹ *Winter v. Simonton*, 3 Cranch, 104; *Hankin v. Squires*, 5 Bissel, 186; *Wetherell v. Swan*, 32 Me. 247; *Buzzell v. Snell*, 25 N. H. 471; *McKinney v. Slack*, 49 N. J. Eq. 164; *Edmonds v. Edmonds*, 1 Ala. 86; *McLendon v. Hamblin*, 34 Ala. 86; *Irwin v. Geronou*, 18 La. An. 228; *Caulfield v. Sanders*, 17 Cal. 569; *Yarnell v. Anderson*, 14 Mo. 619.

¹² *Emery v. Estes*, 31 Me. 155; *Craig*

carrier, when sued on the contract of carriage, to prove that the loss was through an excepted peril;¹ or that the goods were not in a good condition when delivered to the carrier;² or did not come to the carrier.³

§ 358. It is in cases of tort that jurists, both ancient and modern, have found the greatest difficulty in the determination of the question before us.⁴ The true solution is this: the burden lies on the party seeking in a court of justice either to make good his claim for damages arising from the tort of another, or to establish a release from such claim, supposing it to be made out against himself, by imputing tort to the plaintiff. Hence, according to the Roman law, he who charges *dolus* or *culpa* on another must prove such *dolus* or *culpa*; while he who, on such case being made out, sets up *casus*, or the contributory agency of the plaintiff, must prove such *casus*, or contributory agency.⁵ In our own law, it is an elementary principle that a party setting up a tort has the burden on him to prove such tort.⁶ Thus, as will presently be more fully seen, when the cause of action is negligence, the plaintiff must prove the negligence;⁷ when it is deceit, the plaintiff must prove the deceit;⁸ when deceit is set up as a defence, the deceit must be proved by the defendant.⁹ If, to a tort, justification is

v. Proctor, 6 R. I. 547; *Dresser v. Ainsworth*, 9 Barb. 619. But see *Delano v. Bartlett*, 6 Cush. 364; *Cook v. Noble*, 4 Ind. 221; *Topper v. Snow*, 20 Ill. 434; *Miller v. Deal*, 9 Rich. S. C. 75.

¹ *Steamer Niagara v. Cordes*, 21 How. 7; *Tarbox v. Steamb. Co.* 50 Me. 339; *Shaw v. Gardner*, 12 Gray, 488; *Byrne v. Boadle*, 2 H. & C. 722; *Vaughan v. R. R.* 5 H. & N. 579; *Freemantle v. R. R.* 10 C. B. N. S. 89; *Humphreys v. Switzer*, 11 La. An. 320. See other cases in Whart. on Neg. § 128.

² *Illinois R. R. v. Cowles*, 32 Ill. 116.

³ *Price v. Powell*, 3 N. Y. 322.

⁴ See, particularly, *Leyser, Medit. ad Pand. sp.* 176; *Höpfner, Comment.*

Inst. § 761, n. 4; *Glück, Pandekt.* 4, § 324; *Schmidt, Comment. von gericht. Klagen*; *Endemann, Beweislast.* 49; *Weber, Heffter's ed.* 172.

⁵ *Weber, Heffter's ed.* 173.

⁶ See cases cited *supra*, § 357.

⁷ *Infra*, § 359.

⁸ *Huchberger v. Ins. Co.* 5 Bissel, 106; *Holbrook v. Burt*, 22 Pick. 546; *Strong v. Place*, 4 Robb. N. Y. 385; *Mutual Ins. Co. v. Wager*, 27 Barb. 354; *Grimmell v. Warner*, 21 Iowa, 11; *Oaks v. Harrison*, 24 Iowa, 179; *Robinson v. Quarles*, 1 La. An. 460. See *Bigelow's Cases on Torts*, 1-59.

⁹ *Huchberger v. Ins. Co.* 5 Bissel, 106; *Trenton Ins. Co. v. Johnson*, 4 Zab. 576; *New York Ins. Co. v. Graham*, 2 Duvall, 506.

set up by the defendant, the burden is on him to prove such justification.¹ And so when the defendant, to an action for trespass, sets up probable cause on his part to believe that the land belonged to himself, he must prove such probable cause.²

§ 359. The question has been sometimes put, whether, supposing we have simply a case of injury produced by a defendant, the plaintiff, on proving such mere injury, may not close, leaving it to the defendant to discharge himself by proof of due care. The point, however, is purely speculative, not likely ever to arise in fact, and likely, if discussed theoretically before a jury, to mislead. The hypothesis of a perfectly colorless, motiveless, isolated injury, which can be proved without necessarily proving some circumstances from which negligence or malice can be either inferred or negatived, is as absurd as is the hypothesis of an abstract killing, which the schoolmen conceived in order to justify their doctrine of abstract malice being deducible from abstract killing as a presumption of law. To take up the case immediately before us, it is impossible to suppose evidence of a railway injury without evidence of how such injury was received. It is possible, of course, to imagine a witness coming into court to say, "A. was injured by B.;" or, "A. was killed by B.;" but this would be a conclusion of law which would be inadmissible. The only evidence that could be received in such case would be the facts in the concrete; and the facts could not be proved in the concrete without showing something as to how the hurt was inflicted. If these circumstances do not indicate negligence (or malice, if the suit be for a malicious injury) on the part of the defendant, then the plaintiff must be nonsuited. The burden is on him to prove an unlawful act on the part of the defendant.³

Burden on party setting up negligence to prove it.

¹ Brackett v. Hayden, 15 Me. 347; Lyndsay v. R. R. 27 Vt. 613; Ware v. Loring v. Aborn, 4 Cush. 608; Gaul v. Fleming, 10 Ind. 253; Treadwell v. Joseph, 1 Sumn. 390.

² Walther v. Warner, 26 Mo. 143.

³ Cotton v. Wood, 8 C. B. N. S. 568; Scott v. Docks, 3 H. & C. 596; Hammaek v. White, 11 C. B. N. S. 588; Toomey v. R. R. 3 C. B. N. S. 146; Carpue v. R. R. 5 Q. B. 751; Beaulieu v. Portland Co. 48 Me. 291; Lyndsay v. R. R. 27 Vt. 613; Ware v. Gay, 11 Pick. 106; Lane v. Crombie, 12 Pick. 177; Robinson v. R. R. 7 Gray, 92; Parrott v. Wells, 15 Wall. 524; The Empire State, 1 Ben. 57; Russel Manuf. Co. v. R. R. 50 N. Y. 121; Losee v. Buchanan, 51 N. Y. 476; Gillespie v. City, 51 N. Y. 468; McCully v. Clarke, 49 Penn. St. 399; Empire Trans. Co. v. Wamsutta Co. 63 Penn. St. 17; Balt. & O. R. R. v.

§ 360. An interesting question, as to which there have been great fluctuations of opinion, here arises as to the burden of proving negligence in a suit against a railroad company for setting fire to adjacent property by sparks from its locomotives. Supposing that the railroad company is authorized to use locomotives, then it is not liable for any injury incident to the working of the locomotives, provided it has used proper caution and skill in selecting and running them. We should hold, therefore, on principle, that a suit against a railroad company, in cases of this class, would stand on the same footing as suits against private individuals for injuries caused by the negligent escape of fire from the latter's premises; in other words, that the burden is on the plaintiff to prove that the escape of fire was through the negligence of the defendant. And so has it been frequently held.¹ On the other hand, it has been argued that from the rapidity of movement of locomotives, and the difficulty of identifying them, it is peculiarly incumbent on the defendant in such issues, to show the character of the engines by which the fire was communicated; and for this reason (for no other is available for this purpose), it has been held that proof of fire having been communicated throws the burden of exculpation on the defendant.² In some states, this has been provided by statute.³

Fitzpatrick, 35 Md. 32; Frech v. R. R. 39 Md. 574; Bradley v. Northern Nav. Co. 15 Oh. St. 553; McMahon v. Davidson, 12 Minn. 337; Chicago v. Mayor, 18 Ill. 349; City v. Hildebrand, 61 Ill. 155; Comstock v. R. R. 32 Iowa, 376; Gliddon v. McKinstry, 28 Ala. 408; Dobbs v. Justices, 17 Ga. 624; Mitchell v. R. R. 30 Ga. 22; Tourtellot v. Rosebrook, 11 Metc. (Mass.) 460. As to special statute directing the contrary, see § 360.

¹ Vaughan v. R. R. 5 H. & N. 679; Jones v. R. R., L. R. 3 Q. B. 737; Hammersmith v. Brand, L. R. 4 H. of L. 171; Smith v. R. R., L. R. 5 C. B. 98; Burroughs v. R. R. 15 Conn. 124; Shelton v. R. R. 29 Barb. 226; S. C. 14 N. Y. 218; Hinds v. Barton,

25 N. Y. 544; Morris & E. R. R. v. State, 36 N. J. 553; Phil. & Read. R. R. v. Yeiser, 8 Barr. 366; Hugett v. R. R. 23 Penn. St. 373; R. R. v. Yenger, 73 Penn. St. 121; Jeffers v. R. R. 3 Houst. 447; Robinson v. R. R. 32 Mich. 322; Smith v. R. R. 37 Mo. 287; Herring v. R. R. 10 Ired. 402; McCreedy v. R. R. 2 Strob. 356; Macon R. R. v. McConnell, 37 Ga. 481; Flynn v. R. R. 40 Cal. 14; McCummons v. R. R. 33 Iowa, 187; Kans. P. R. R. Co. v. Butts, 7 Kans. 308.

² Spaulding v. R. R. 30 Wise. 110; Galpin v. R. R. 19 Wise. 606; Burke v. R. R. 7 Heisk. 451; Horne v. R. R. 1 Cold. 72; Hull v. R. R. 14 Cal. 387. See Coale v. R. R. 60 Mo. 235, where this conclusion is approximated.

³ So in Vermont, see Grand Trunk

This, however, cannot, at common law, be sustained, as it would lead to a judgment of negligence being entered when no negligence was proved. At the same time, in view of the fact that the tests of determining the adequacy of the engines and appointments of the road are almost exclusively in the power of the defendant, very slight proof of negligence offered by the plaintiff is sufficient to throw the burden of exculpation on the defendant.¹

R. R. v. Richardson, U. S. Sup. Ct., Oct. 7, 1875. In Maine, *Chapman v. R. R.* 37 Me. 92. In Maryland, *Balt. & S. R. R. v. Woodruff*, 4 Md. 242. In Illinois, *Chic. & N. W. R. R. v. McCahill*, 56 Ill. 28. As to proof of prior firings to affect this burden, see *supra*, § 42.

¹ See this point discussed in *Whart. on Neg.* §§ 871-2.

This argument, that the burden in such cases is on the plaintiff, is ably presented by Holmes, J., in *Smith v. R. R.* 37 Mo. 287: —

"We cannot say that there was any evidence before the jury which tended to show actual negligence on the part of the defendant, and the plaintiff was not entitled to recover, unless the proposition can be maintained that from the mere fact that a fire was set by sparks from the engines, and damage done, 'the presumption is that said fire escaped by the negligence of the defendant or its agents.' The instruction seems to propound a conclusive presumption of law in reference to the issue, and a kind of disputable presumption of fact in reference to the matter of negligence. The question presented is whether these facts amount to a *prima facie* case of liability on the ground of negligence.

"There are no statutes in this state which declare that any such state of facts shall constitute a presumptive or *prima facie* case of liability, nor does this belong to a class of cases in which there are any special presumptions of

law or fact arising out of the peculiar relations of the parties or privity of contract. Presumptions are mere arguments at best, and are only such as would warrant a jury in inferring the fact of negligence from the other facts proved, in the ordinary course of reasoning, according to the natural and proper relations of things, and the common sense and experience of mankind. 1 *Greenl. Ev.* §§ 44, 48. It is not apparent how, by any rational process of thinking, a jury could draw the conclusion, from the facts proved here, that the defendant had been guilty of actual negligence. The more reasonable presumption would rather seem to be that the fire had occurred by accident or mischance. On the other hand, there would seem to be like ground for a presumption equally strong that the fire had been set by sparks from the burning cornstalks, and that there had been negligence on the part of the plaintiff.

"The allegation is not merely of a fire and damage by sparks from the engine, but that the whole thing was caused by the negligence of the defendant, and on this the issue is taken. The negligence is thus made to be the substance of the issue. It is the whole ground and very gist of the action, and it must be proved as laid. It is a familiar rule that the proofs must correspond to the allegations. It is not enough that a part of the facts involved in the inquiry are made to appear. The whole issue

§ 361. Suppose it be alleged, on the part of the defendant, that the injury accrued through the plaintiff's negligence, on whom lies the burden? No doubt we have dicta to the effect that a plaintiff suing for damages

In a suit
for negli-
gent use of
a legal
right, con-

must be proved, and the burden of proof is on the plaintiff. If he failed to prove the whole issue, he comes short of making out a *primâ facie* case, and the jury should be instructed to find for the defendant.

"But in all that class of cases where no statute interferes, and no peculiar relation or privity of contract exists, and the parties stand in the position of strangers, with only those rights and mutual obligations which belong to all neighbors and persons alike, in the use and enjoyment of their own property, and in the conduct of their own lawful business, and negligence is the ground of action, the burden of proof is always on the plaintiff; the fact of negligence must be proved, and there is no such thing as a presumption of negligence as a matter of law without proof of the fact, and no other presumption of fact than such as belongs to the proper force and the rational weight of the evidence, of which, when there is any, the jury is to judge, under the instructions of the court. This rule was applied in the case of *Schultz v. Pacific R. R.* 36 Mo. 13.

"The defendant is not liable for mere accident or mischance, nor unless it can be also shown that there was actual negligence which caused or produced the accident and damage. Without the aid of sheer conjecture, or some presumption of law or fact, beyond what the facts proved rationally imported, it is not easy to see how the jury could infer either that the defendant had been guilty of negligence, or that the fire was set by sparks from the engine, rather than

from the burning corn-stalks. The jury is not to jump at a conclusion without proofs. It has been well asserted that if a liability were to be inferred from the mere fact of a fire and damage, it would make railroad companies insurers against all fires occurring along the road, from whatever cause; and if the same thing were to be presumed from the bare fact of a fire set by sparks from an engine, that would make them liable even for the slightest omission or neglect, or for mere accident or misadventure arising from the act of God, the operation of natural causes, or other circumstances beyond their control, or for the legitimate exercise of their own lawful rights and powers, and for damages within the principle of *damnum absque injuria*. The plaintiff must make out affirmatively a *primâ facie* case of liability.

"It seems to be supposed that a different rule prevails in England, which is rather to be preferred on the score of justice and good policy. *Redf. Railw.* 357. Upon examination of the authorities referred to, we do not find any satisfactory ground for this distinction. In *Aldridge v. Great Western R. R. Co.* (3 Man. & Gr. 515) the court merely refused to nonsuit the plaintiff on the case made, and it was distinctly intimated that negligence was no more to be presumed from the mere fact of a fire set by sparks, than from the fact that a rick of beans was placed near the railroad, and that 'to enable the plaintiff to recover he must show some carelessness, or lay facts before the jury from which it may be inferred.' In other cases there was

alleged to have been sustained by him through another's negligence, should show that his own negligence was not the cause of the disaster;¹ and it is clear that a plaintiff may be nonsuited if, on his own showing, it

tributory
negligence
to be
proved by
the de-
fence.

strong proof of actual negligence, as in overtaking the engine and running it without any kind of spark arresters, though such inventions were then in use; *Piggott v. Eastern Counties R. R. Co. Gr. & S. (C. B.)* 229; *Hammon v. Southeastern R. R. Co., Maidst. Assiz.* 1845; *Walf. Railw.* 182, n. c; or in running engines which cast forth sparks in a dangerous manner, where the embankment of the railroad was covered with inflammable grasses, weeds, and peat, without having taken any steps, on previous notice of the danger, to clear the combustible material from their tracks; *Vaughn v. Taff Vale R. R. Co.* 3 Hurl. & Nor. 742; and these cases are not inaptly likened to the old cases of a man riding an unruly horse into Lincoln's Inn Fields (1 Vent. 295), or suffering a mad bull (1 Lutw. 36), or a biting dog (2 Str. 1264), or 'a thing intrinsically dangerous,' to go at large, with a *scienter*. But it cannot be fairly maintained or assumed that all railroad engines are of that character, or that any particular one is to be brought within that category, without evidence clearly showing the fact to be so, or that there was actual negligence in the manner and under the circumstances in which it was employed on that particular occasion.

"In *Bass v. Chicago, Burl. & Quincy*

R. R. Co. 28 Ill. 9, a demurrer was overruled to a declaration charging that the acts complained of had been carelessly and negligently done, and stating a very strong case of actual negligence on the part of the defendant; and the opinion of the court, while conceding the result of the American authorities, supposes that a more stringent rule prevails in England, and one which was thought to be more in accordance with justice and the policy indicated by the statutes of some states. However this may be, until the legislature sees fit to change the law on the subject, we must be guided by the established principles governing the case.

"In *Ellis v. Portsm. R. R. Co.* 2 Iredell, 138, the court below had charged the jury, that if they believed the plaintiff's fences were burned by fire from the engines, the defendant was liable; but on appeal, *Gaston, J.*, expressly declared that the gravamen of the complaint was, that the damage was caused by the negligence of the defendant, and that the court did not sanction the doctrine laid down in the charge; but it was held that when the plaintiff shows damage resulting from an act which, 'with the exertion of proper care, does not ordinarily produce damage, he makes a *prima facie* case of negligence.' This case, like

¹ *Lane v. Crombie*, 12 Pick. 177; *Murphy v. Deane*, 101 Mass. 466; *Allyn v. R. R.* 105 Mass. 77; *Birge v. Gardiner*, 19 Conn. 507; *Evansville R. R. v. Hiatt*, 17 Ind. 102; *Galena R. R. v. Fay*, 16 Ill. 558; *Donaldson*

v. R. R. 18 Iowa, 280; *Baird v. Morford*, 29 Iowa, 531; *Muldowney v. R. R.* 32 Iowa, 176; *Patterson v. R. R.* 38 Iowa, 279; *Lake Shore R. R. v. Miller*, 25 Mich. 274; *Jones v. R. R.* 67 N. C. 122.

appear that the disaster was brought on by himself.¹ But if he makes out a case of negligence on part of the defendant, and the

that of *Hull v. Sac. Val. R. R. Co.* 14 Cal. 387, in which there was evidence showing that the result was not probable from the ordinary working of the engine, may be said to go to the extreme verge of the law in sustaining a verdict, on the ground that there was some evidence to support it; but they do not justify the proposition that negligence is ever to be presumed in these cases as a matter of law, nor as a matter of fact, without some evidence from which the fact of actual negligence, causing the damage, might rationally be inferred."

Of this view, however, we have subsequently the following modification: "Firstly, the jury, in order to charge the defendant, must find affirmatively that the fire escaped from the smoke-stacks of its engine, through the negligence of its agents or servants. *Smith v. R. R.* 37 Mo. 287. The burning, the damage, the escape of the fire, and the negligence, are all facts to be charged and proved. But they must be proved like all other facts, by such evidence as shall satisfy a reasonable mind of their existence. It is sometimes said that negligence is presumed from the escape of the fire. *Ill. Cent. R. R. Co. v. Wells*, 42 Ill. 407. But, while this can hardly be called a presumption, as the term is generally used, it may be a fair and reasonable inference. The language of Judge Holmes, in *Smith v. R. R.* 295, is very strong, and liable to misconstruction, unless compared with the case and the rest of the opinion. If

the plaintiff were required to prove affirmatively and specifically the condition of the particular smoke-stack from which the fire escaped, — if he were bound to show the specific negligence that permitted its escape, — it would be equivalent to denying him relief altogether. The farmer, along whose field the train flies, from the nature of the case, can know nothing about these things. He cannot know the engine, nor can he tell the contrivances needed, used, or neglected. All that he can in most cases show is that the fire escaped and destroyed his property. It is an inference of reason that fire should not so escape. When as dangerous, as well as useful, an instrument of locomotion as a steam locomotive is used, its managers are bound to a care and precaution commensurate with the danger. They have a right to use the instrument, but have no right to scatter fire along their track; and when it is found that this is done, with no explanation of the cause, the jury is warranted in inferring that there has been some neglect. To rebut that reasonable inference, the defendant should show that the best machinery and contrivances were used to prevent such a result, and that careful and competent servants were employed. *Vaughn v. Taff Vale R. R.* 3 Hurlst. & N. 743; same case on review in 5 Hurlst. & N. 679; *Freemantle v. London & N. W. R. R.* 10 C. B. N. S. 19." *Bliss, J., Fitch v. R. R.* 45 Mo. 362.

In 1875, the same court appears to

¹ *Holden v. Liverpool*, 3 C. B. 1; *Brown v. R. R.* 58 Me. 384; *Gahagan v. R. R.* 1 Allen, 187; *Brooks v. Somerville*, 106 Mass. 271; *Haring v. R. R.* 13 Barb. 9; *Gillespie v. N.*

Y. 54 N. Y. 468; *Hays v. Gallagher*, 72 Penn. St. 140; *Central R. R. v. Moore*, 4 Zab. 824; *Langhoff v. R. R.* 19 Wis. 497; *Rothe v. R. R.* 21 Wis. 256.

defendant then undertakes to prove that the plaintiff's negligence was the primary cause, this is a defence which, on the principles previously stated, the burden is on the defendant to prove.¹

§ 362. When a person who contracts to perform a particular duty to another person or thing is sued for negligent injury to such person or thing, then the plaintiff need only prove the injury; and the burden is on the defendant to excuse himself by proof of the exercise of due diligence. What such diligence is, depends upon the nature of the contract, as elsewhere discussed. That it must be proved as an excusatory defence by the defendant, and that the burden is on him to do so, is plain. The defendant has engaged to perform a particular duty, and the tort consists in the non-performance of such duty. That the defendant failed to perform his duty through negligence, is not part of the plaintiff's case. The plaintiff, it is true, in proving the non-performance of duty by the defendant, may bring out such incidents as show negligence on the part of the defendant. But it is not a necessity of the plaintiff's case to do this; and if the defendant desire to relieve himself, by showing a due performance of duty, he must do so, either by directly traversing the plaintiff's case as to the fact of injury, or by proving (and the burden is on the defendant to do this) that the injury occurred without his particular fault. A creditor, for instance, receives a piece of silver plate in pawn. If this

In a suit brought for non-performance of contract the plaintiff need only prove the failure to perform the contract.

abandon Judge Holmes's reasoning, and to hold that the scattering of fire being proved, the company must disprove negligence.

"The law, as settled in this state, is, that where it is proved that the property was destroyed by fire escaping from the defendant's engine, a *prima facie* case of negligence is made out; that the burden is then thrown on the defendant, by its evidence, to rebut the presumption of negligence by showing the absence of negligence. Whether this is done by the evidence is a question for the jury, which can be decided by them without shifting the burden from one party to the other,

as the evidence progresses, and as seems to be contemplated by the instruction refused. *Bedford v. Hann. & St. Jo. R. R.* 46 Mo. 456; *Clemens v. R. R.* 53 Mo. 366, and case cited." *Vories, J., Coale v. R. R.* 60 Mo. 235.

¹ *Railroad Co. v. Gladmon*, 15 Wall. 401; *Sheldon v. R. R.* 29 Barb. 226; *Oldfield v. R. R.* 14 N. Y. 310; *Johnson v. R. R.* 20 N. Y. 65; *Wilds v. R. R.* 24 N. Y. 430; *Phil. & Read. R. R. v. Yeiser*, 8 Barr. 366; *Huyett v. R. R.* 23 Penn. St. 373; *Cleve. & P. R. R. v. Rowan*, 66 Penn. St. 393; *Freeh v. R. R.* 39 Md. 574; *Smith v. R. R.* 37 Mo. 287; *Thompson v. R. R.* 51 Mo. 190.

is lost, without any *culpa* on his part, he must prove this fact, in order to be released from liability.¹ A herd of goats are taken by a herdsman to pasture. They are carried off by robbers, without the fault of the herdsman. It is not necessary for the owner to prove want of due care in the herdsman; but the burden is on the herdsman to prove that the loss of the herd was not due to want of care by himself.² Suppose, again, goods are hired by H. from L., and when in H.'s possession are damaged, either through defects existing in the goods when in H.'s possession, or through H.'s misconduct. If the views above given be correct, the burden is on H., when sued for the loss, to show either that the loss was due to causes involving no misconduct on his part, or to defects inherent in the goods at the time they were hired. If he cannot make out such a defence, he is bound to indemnify the owner. It is true, as has been argued, that it is a fraud in the owner of goods, when, knowing them to have latent defects which will cause their depreciation or loss, to withhold notice of such defects from the hirer.³ But to this it is pertinently replied, that business would be brought to a standstill, if the owner of goods, in a suit for injuries sustained by them, was compelled to prove that which, from the nature of things, he could rarely be able to do, that the goods when they left his possession were free from latent faults.⁴ Public policy, in such case, unites with juridical principle in requiring the defendant (*i. e.* the party undertaking by contract to do a particular thing) to show, when sued on the contract, either that the thing was done by him, or that he has good grounds of excuse.⁵

§ 363. If, in cases of bailment, the plaintiff, suing in tort, alleges negligence in his declaration, is the burden on him to prove such negligence? The Roman law answers this question in the negative, though it is admitted that, in the strict order of proof, such burden may lie on the plaintiff in his replication. The plaintiff, for in-

Rule is altered where plaintiff sues in tort.

¹ L. 5, C. de pig. act. (iv. 24.)

² L. 9, § 4, D. loc. xix. 2.

³ See Garve's criticism on Paley's Mor. Phil. ii. 512.

⁴ See Weber, Heffter's ed. 177.

⁵ *Chicopee Bank v. Phil. Bank*, 8 Wall. 641; *The Live Yankee, Deady*, 420; *McGregory v. Prescott*, 5 Cush. 67; *Murrell v. Whiting*, 32 Ala. 54. See Whart. on Neg. § 421.

stance, alleges a negligent loss of goods ; under this allegation it is enough to prove that the goods were not restored to the plaintiff on demand. Or the defendant proves *casus* as a defence. If the plaintiff desires to avoid this defence by showing that the *casus* was induced by the defendant's negligence, then the burden is on the plaintiff to prove such inculpatory negligence on the part of the defendant.¹ But though this conclusion may be logically correct, and though it has received occasional approval from the courts,² yet it must now be regarded as the better opinion, that if a bailor elects to sue a bailee in tort, and avers tort, and claims damages for tort, he must in all cases in which the evidence shows a loss for which, *primâ facie*, the bailee is not liable, prove the tort he avers. It is true that the proof, especially when the suit is for negligence, need be but slight. The mere circumstances attending the injury, when put in proof, may be enough to throw the burden of exculpation on the defendant. But something, however slight, there must be in the plaintiff's case from which negligence may be inferred, or the plaintiff may be nonsuited.³ No doubt in such case, as in all other cases against bailees, the burden is on the bailee, when sued, to prove such a loss as would exonerate him. "The burden of the proof of the loss, which brings the carrier within the restriction of his contract," as has been well stated,⁴ "lies on him ; but when he has proved such a loss, unattended by cir-

¹ See, also, *Chicopee Bank v. Phil. Bank*, 8 Wall. 641 ; *Patterson v. Clyde*, 67 Penn. St. 500 ; *Whart. on Neg.* § 422 ; *Story on Bailments* (Bennett's ed.), § 410.

² See *Cass v. R. R.* 14 Allen, 448 ; *Platt v. Hibbard*, 7 Cow. 497 ; *Westcott v. Fargo*, 63 Barb. 349 ; and see *MacKenzie v. Cox*, 9 C. & P. 632.

³ *Marsh v. Horne*, 5 B. & C. 323 ; *Gilbart v. Dale*, 5 Ad. & El. 543 ; *Harris v. Packwood*, 3 Taunt. 267 ; *Carpue v. R. R.* 5 Q. B. 751 ; *Butt v. R. R.* 11 C. B. 140 ; *Midland R. R. v. Bromley*, 17 C. B. 372 ; *Finucane v. Small*, 1 Esp. 316 ; *Steele v. Townsend*, 37 Ala. 247 ; *Ketchum v. Exp.*

Co. 52 Mo. 390 ; *Harnden v. Nav. Co.* 6 How. 344 ; *Trans. Co. v. Downer*, 11 Wall. 134 ; *Lamb v. R. R.* 46 N. Y. 271 ; *Russell v. St. Co.* 50 N. Y. 121 ; *Bell v. Reed*, 4 Binn. 127 ; *Farnham v. R. R.* 55 Penn. St. 53 ; *Empire Trans. Co. v. Wamsutta Oil Co.* 63 Penn. St. 17 ; *Patterson v. Clyde*, 67 Penn. St. 500 ; *Graham v. Davis*, 4 Oh. St. 362. See, also, *Abbott on Ship.* 390 ; *Story on Bailm.* § 573 ; *Addison on Torts* (ed. of 1876), § 546.

⁴ *Agnew, C. J.*, *Patterson v. Clyde*, 67 Penn. St. 500, affirming *Farnham v. R. R.* 55 Penn. St. 53.

circumstances indicating negligence, the *onus* of the proof of negligence is cast upon the plaintiff."

§ 364. What has just been said applies to torts in which the case, as presented, exhibits a loss for which *primâ facie* the bailee is not liable. It is scarcely necessary to add that in contracts, when no such *primâ facie* exemption is shown, the burden of exculpation is on the bailee. A bailee, being required by the terms of his bailment to restore the bailed article, if sued for the same; when the bailment is proved, has the burden on him to prove that he is discharged from his liability.¹

§ 365. That impossibility or *casus* must be proved by the defendant has been already incidentally stated. A bailee, for instance, who is sued for damage done to his bailor's property, has the burden on him of proving that the damage was done through *casus*, should he set up such a defence.² If the defence be proved, the plaintiff, if he reply that the impossibility or *casus* was induced by the defendant's misconduct, must prove such misconduct.

§ 366. So far as good faith and legality are assumed as belonging to ordinary business transactions,³ it may be generally held that the burden of proof is on the party assailing good faith or legality;⁴ though not as to a trans-

¹ Garside v. Proprietors, 4 T. R. 581; Chicopee Bk. v. Phil. Bk. 8 Wall. 641; Lamb v. R. R. 7 Allen, 98; Cass v. R. R. 14 Allen, 448; Arent v. Squire, 1 Daly, 347; Price v. Powell, 3 N. Y. 322; Illinois R. R. v. Cowles, 32 Ill. 116; Day v. Raguet, 14 Minn. 273; Beckman v. Shouse, 5 Rawle, 179; Humphrey v. Reed, 6 Whart. 435; Whitesides v. Russell, 8 W. & S. 44.

² See Whart. on Neg. § 128, and cases cited supra, § 356-7.

³ See infra, § 1248.

⁴ Huchberger v. Ins. Co. 5 Bissell, 106; Jordan v. Dobson, 2 Abb. U. S. 398; Cooper v. Galbraith, 3 Wash. C. C. 546; Rockville Co. v. Van Ness, 2 Cranch C. C. 449; Hager v. Thomson,

1 Black, 80; Blaisdell v. Cowell, 14 Me. 370; New Portland v. Kingfield, 55 Me. 172; Jay v. Carthage, 48 Me. 353; Winslow v. Gilbreth, 50 Me. 90; Bradish v. Bliss, 35 Vt. 326; Packard v. Clapp, 11 Gray, 124; Beatty v. Fishel, 100 Mass. 448; Salmon v. Orser, 5 Duer, 511; Marsh v. Falker, 40 N. Y. 562; Vanderveer, in re, 20 N. J. Eq. 463; Tarden v. Davis, 5 Whart. R. 338; Roberts v. Guernsey, 3 Grant (Penn.), 237; Hutchinson v. Boggs, 28 Penn. St. 294; Horan v. Weiler, 41 Penn. St. 470; Calvert v. Carter, 18 Md. 73; Vathir v. Zane, 6 Grat. 246; Wilson v. Lazier, 11 Gratt. 477; Sheehan v. Davis, 17 Oh. St. 571; Ewing v. Gray, 12 Ind. 64; Mahony v. Hunter, 30 Ind. 246; Sutphen v. Cush-

action in itself unfair.¹ Thus unfairness will be inferred as to sales to a client from a counsel, or to a principal from a confidential agent; and the burden is on the party taking under such sale to prove its fairness.² So there is no presumption of good faith which will sustain a concession to a wrong-doer from the party injured.³

§ 367. It has been sometimes said that when a fact is peculiarly within the knowledge of a party, the burden is on him to prove such fact, whether the proposition be affirmative or negative.⁴ Thus where proceedings were taken for the contravention of an order of the English privy council under the Contagious Diseases (animals)

Burden is on party to prove what it is his duty to prove.

Act of 1869, ordering that a person having in his possession animals affected with any contagious disease, should with all practicable speed give notice of the fact to a police constable, it was held by the court of common pleas that, on proof of the existence of the disease to the defendant's knowledge, the *onus* lay upon him of showing that he gave the necessary notice.⁵ So it is said, that where a creditor shows facts that raise a strong presumption of fraud in a conveyance made by his debtor, the history of which is necessarily known to the debtor only, the burden of proof lies on him to explain it; his estate being in-

man, 35 Ill. 186; *Reed v. Noxon*, 48 Ill. 323; *Bullock v. Narrott*, 49 Ill. 62; *Thompson v. Wharton*, 7 Bush, 563; *Evans v. Evans*, 2 Coldw. 143; *Habersham v. Hopkins*, 4 Strobb. 238; *Sheffield v. Parmlee*, 8 Ala. 889; *Ross v. Drinkard*, 35 Ala. 434; *Greenwood v. Lowe*, 7 La. An. 197; *Martin v. Drumm*, 12 La. An. 494; *Coreoran v. Sheriff*, 19 La. An. 139; *Silvers v. Hedges*, 3 Dane, 439; *Sutter v. Lackman*, 39 Mo. 91; *Waddingham v. Loker*, 44 Mo. 132; *Bumpus v. Fisher*, 21 Tex. 561.

¹ *Loomis v. Green*, 7 Greenl. 386; *Short v. Staple*, 1 Gall. 104; *Easter v. Allen*, 8 Allen, 7; *Costigan v. Mohawk Co.* 2 Denio, 609; *Barnawell v. Threadgill*, 3 Jones N. C. (Eq.) 50; *Hair v. Little*, 28 Ala. 236; *Sheils v. West*, 17 Cal. 324; *Paxton v. Boyce*, 1 Tex. 317.

² *Clarke v. Lamotte*, 15 Beav. 240; *Walker v. Smith*, 29 Beav. 396; *Lowther v. Lowther*, 13 Ves. 103; *Dunne v. English*, L. R. 18 Eq. 524; *Wistar's Appeal*, 54 Penn. St. 60; *Brown v. Bulkley*, 13 N. J. Eq. 451; *Uhlich v. Muhlke*, 61 Ill. 499. And see cases in *Whart. on Agency*, § 232.

³ *Infra*, § 1264; *Loomis v. Green*, 7 Greenl. 386; *Costigan v. Mohawk R. R.* 2 Denio, 609; *Pinn v. Wharf Co.* 7 Cal. 253.

⁴ *Apoth. Co. v. Bentley*, Ry. & M. 159; *Great West. R. R. v. Bacon*, 30 Ill. 347; *Ford v. Simmons*, 13 La. An. 397. See limitations of above in *Chaffee v. U. S.*, quoted *infra*, § 371.

⁵ *Huggins v. Ward*, 21 W. R. 914; *Powell's Evidence*, 4th ed. 293.

solvent.¹ It has been further held that when a person who is able to exercise dominion over another takes a benefit from him, such person must prove that the transaction was a righteous one,² and that the gift was intended to be given.³ Another illustration of the rule is to be found in the practice of treating a deed or instrument, which is *primâ facie* good, as what it purports to be,⁴ and the *onus* of proving that it is not what it purports to be, or that it is invalid, rests upon the party impeaching it.⁵ Again, "where there is *primâ facie* evidence of any right existing in any person, the *onus probandi* is always upon the person or party calling such right in question."⁶ So on the principle that where an act is tainted apparently with illegality, the party justifying it must disprove its illegality, a defendant in libel, who pleads a fair report of proceedings in a court of justice, must prove the correctness of the report.⁷

§ 368. Much difficulty arises in determining as to who has the burden of proof when the question is, whether a person who is sued for doing a particular thing without license, has a license. On the one side it is argued that as a license is particularly within the knowledge of the party holding it, the burden is on him to produce such license, in all cases in which the existence of the license is in question.⁸ On the other hand, it is insisted that as the non-existence of the license is essential to the case of the assailant, it is proper, if we follow the rules already announced, to hold that non-license must be proved by the party to whose case such proof is essential.⁹ In many jurisdictions the doubt has been

License to be proved by the party to whom such proof is essential.

¹ Clements v. Moore, 6 Wall. 299.

² Cooke v. Lamotte, 15 Beav. 240.

³ Walker v. Smith, 29 Beav. 396; cf. Turner v. Collins, L. R. 7 Ch. 329; 41 L. J. Ch. 558; 20 W. R. 305, and supra, § 266. Powell's Evidence, 4th ed. 291.

⁴ Jacobs v. Richards, 18 Beav. 303.

⁵ Nichol v. Vaughan, 1 Cl. & F. 49; Powell's Evidence, 4th ed. 292.

⁶ Banbury Peerage case, 1 S. & S. 155.

⁷ Lewis v. Levy, E., B. & E. 557.

⁸ Smith v. Jeffries, 9 Price, 257; Morton v. Copeland, 16 C. B. 517; Bluck v. Rackman, 5 Moo. R. C. 305, 314; R. v. Turner, 5 M. & Sel. 205; U. S. v. Hayward, 2 Gall. 485. State v. Crowell, 25 Me. 174; State v. McGlynn, 34 N. H. 422; Bliss v. Brainerd, 41 N. H. 256; Garland v. Lane, 46 N. H. 245; Wheat v. State, 6 Mo. 455; Medlock v. Brown, 4 Mo. 379; State v. Lipscomb, 52 Mo. 32.

⁹ Com. v. Thurlow, 24 Pick. 374; Kane v. Johnston, 9 Bosw. 154; State v. Evans, 5 Jones N. C. 250; Mehan

removed by statute. At common law it would seem that where licenses are rare and exceptional, then we may hold that the improbability of a license in each particular case, taken in connection with the rule that a party must produce all evidence peculiarly within his own knowledge, may throw on the defendant the burden of proving license. But under such circumstances it has been held that where a party has the burden of proving a negative, full proof "is not required, but even vague proof, or such as renders the existence of the negative probable, is in some cases sufficient to change the burden to the other party."¹

§ 369. Questions of interest arise when suit is brought upon a document to whose validity certain formalities are requisite. Is the plaintiff, or the defendant, to prove such formalities? It is plain that when the law makes the validity of the document depend upon these formalities, then they must be duly proved by the plaintiff. If a statute, for instance, makes a document inoperative unless duly registered or stamped, then the document cannot be put in evidence without proof of such registry or stamp. But a *prima facie* compliance with the law in this respect is sufficient for the plaintiff's case.² If the document is on its face duly executed, then it will be presumed³ that the execution was regular, and the burden of contesting the execution falls on the party assailing the document.

Burden of proving formalities on him to whom they are essential.

§ 370. As a general rule, we may hold that where a party undertaking to prove a case fails in such proof, the judgment must be against him. *Actore non probante, reus absolvitur*. The following exceptional cases may be here noticed:⁴ —

Importance of question as to burden.

1. The party on whom lies the burden may not make out his

v. State, 7 Wis. 670; *State v. Hirsch*, 45 Mo. 429; *State v. Richeson*, 45 Mo. 575. In Massachusetts, under the statute of 1864, "if the defendant was proved to have kept intoxicating liquors for sale, the burden of proving that he had a license or authority so to do was upon him." Gray, C. J., *Com. v. Curran*, 119 Mass. 206, citing *Com. v. Kennedy*, 108 Mass. 292;

Com. v. Leo, 110 Mass. 411; *Com. v. Shea*, 115 Mass. 102.

¹ *People v. Pease*, 27 N. Y. 45; *Commonwealth v. Bradford*, 9 Mete. 268; 1 Greenl. Ev. § 80. *Sheldon, J., Beardstown v. Virginia*, 76 Ill. 44.

² *Weber*, Heffter's ed. 192.

³ *Infra*, 1313.

⁴ See these points made by Heffter, App. to *Weber*, 297.

case, but the deficient proof may be collected from the evidence offered by the opposite side. The *actor* may have failed in his task of presenting evidence to sustain his claim; he may be liable to be nonsuited, should he be plaintiff; but if by the opposite side the requisite proof is supplied, then the adjudicating tribunal must decide on the whole case, — *Ex fide eorum quae probabantur*.

2. An actor in his own proof shows that there is a hindrance which *per se* prevents a right of action from accruing to him; *e. g.* when he produces a will which on its face is that of a child under fourteen years of age. In such case the burden being on him to make out his case, and he having failed, no burden whatever is imposed on the opposing party.

3. An actor presents a case to which there appears, on its face, a hindrance which is only good when set up by the opposite side. In such case, unless the opposite side set up the hindrance, the actor's case is proved.

§ 371. We shall have occasion hereafter to discuss the effect of a presumption of fact as an element of proof.¹ It is sufficient at this point to say that when a presumption of fact exists against a party, the court may instruct the jury that the burden is on the party to remove the presumption, and that if he does not, then the case must, in a civil issue, go against him on such point.² The question of burden of proof in criminal issues belongs to an independent treatise.³ It may be, however, here generally noticed that in penal prosecutions of all classes, the doctrines above stated, however applicable, are not permitted to interfere with the cardinal principle that the jury must acquit when they have a reasonable doubt of guilt.⁴

Court may instruct jury that a presumption of fact makes a *prima facie* case by which they are bound.

¹ See *infra*, §§ 1226–36.

² *Crane v. Morris*, 6 Peters, 598; *Kelly v. Jackson*, 6 Peters, 622; *U. S. v. Wiggins*, 14 Peters, 334.

³ Whart. Crim. Law (7th ed.), § 707 *a*.

⁴ In *Chaffee v. U. S.* 18 Wall. 516, which was an action of debt for a penalty, we find the question of burden of proof, in cases of this class, thus learnedly discussed:—

“It remains to consider the exceptions taken to the charge to the jury. These are sixteen in number, and are directed principally to the error which pervades the whole charge, consisting in the instruction reiterated in different forms, that, after the government had made out a *prima facie* case against the defendants, if the jury believed the defendants had it in their power to explain the matters appear-

ing against them, and did not do so, all doubt arising upon such *primâ facie* case must be resolved against them. As we have stated, the defendants had paid taxes on over six thousand barrels of whiskey, manufactured by them between the dates mentioned in the declaration. Nearly this number was traced to consignees. By the canal certificates and railroad receipts the government had shown in that case a transportation from Tippecanoe of over two thousand barrels more. It was admitted that no charge was to be made to the defendants for any amount they had on hand in October, 1865, although the declaration charges the possession with the unlawful purpose to have been between February 1, 1865, and September 1, 1866. The defendants endeavored to show that they had on hand at that time between two and three thousand barrels, and for that purpose called in a large number of witnesses, neighbors, and others, who had visited the distillery during that period. The estimates of the amount by these witnesses differed materially, being made from recollection. The defendants were present at the trial, but were not called as witnesses. It was proved that they kept books, consisting of day-books, journals, and ledgers.

“Now the court instructed the jury that it was a rule, without exception, that where a party has proof in his power which, if produced, would render material facts certain, the law presumes against him if he omits to produce it, and authorizes a jury to resolve all doubts adversely to his defence; that, although the case must be made out against the defendants beyond all reasonable doubt, in this case as well as in criminal cases, yet the course of the defendants may have supplied in the presumptions of law all which this stringent rule demanded.

‘In determining, therefore, in the outset,’ said the court to the jury, ‘whether a case is established by the government, you will dismiss from your minds the perplexing question whether it is so made out beyond all doubt. It need not, in the exigencies of this case, be so proved in order to throw the burden of explanation upon the defendant, if, from the facts, you believe he has within his reach that power. In the end, all reasonable doubt must be removed, but here, at this stage, you need say only, is the case so far established as to call for explanation.’ . . . ‘If, then, you conclude that, unexplained and uncontroverted by any testimony, the opening proof would enable you to find against the defendants, for the claim of the government, or any material part of it, you will take up their testimony in view of the principle’ stated, that of presuming against a party who fails to produce proofs in his possession. And again, the court instructed the jury that the law presumed that the defendants kept the accounts usual and necessary for the correct understanding of their large business, and an accurate accounting between the partners, and that the books were in existence and accessible to the defendants, unless the contrary were shown, and then said to the jury, ‘If you believe the books were kept which contained the facts necessary to show the real amount of whiskey in the hands of the defendants in October, 1865, and the amount which they had sold during the next ten months, or that the defendants, or either of them, could, by their own oath, resolve all doubts on this point; if you believe this, then the circumstances of this case seem to come fully within this most necessary and beneficent rule.’

“The purport of all this was to tell

the jury that, although the defendants must be proved guilty beyond a reasonable doubt, yet if the government had made out a *prima facie* case against them, not one free from all doubt, but one which disclosed circumstances requiring explanation, and the defendants did not explain, the perplexing question of their guilt need not disturb the minds of the jurors; their silence supplied in the presumptions of the law that full proof which should dispel all reasonable doubt. In other words, the court instructed the jury, in substance, that the government need only prove that the defendants were presumptively guilty, and the duty thereupon devolved upon them to establish their innocence; and if they did not, they were guilty beyond a reasonable doubt.

“We do not think it at all necessary to go into any argument to show the error of this instruction. The er-

ror is palpable on its statement. All the authorities condemn it. *Doty v. State*, 7 Blackford, 427; *State v. Flye*, 26 Me. 312; *Commonwealth v. McKie*, 1 Gray, 61. The case of *Clifton v. United States*, in 4 Howard, cited by the court below, was decided upon a statute which cast the burden of proof upon the claimant in seizure cases, after probable cause was shown for the prosecution, and, therefore, has no application. 1 Sts. at Large, 678; *Locke v. W. G.* 7 Cranch, 339. The instructions set at nought established principles, and justifies the criticism of counsel, that it substantially withdrew from the defendants their constitutional right of trial by jury, and converted what at law was intended for their protection, — the right to refuse to testify, — into the machinery for their sure destruction.” *Field, J., Chaffee & Co. v. United States*, 18 Wall. 541-6.

CHAPTER VIII.

WITNESSES.

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 Privilege must be claimed in order to be applied and may be waived, § 584.
 Privilege applies to client's documents in lawyer's hands, § 585.
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 Communications, to be privileged, must be made to party's exclusive adviser, § 587.
 Lawyer not privileged as to information received by him extra-professionally, § 588.
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 Privilege does not extend to communications in view of breaking the law, § 590.
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macy, § 608.

XVI. DEPOSITIONS.

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I. PROCURING ATTENDANCE.

§ 376. As a general rule, it is the duty of all persons cognizant of facts material to a litigated issue to testify as to the same. In the classical Roman law, in civil cases, this duty was not to the court, but to parties; and the parties alone, as a rule, could proceed against a witness refusing to appear, or refusing to answer. In public penal prosecutions (*judicia publica*), and in cognate civil suits involving public interests, a compulsory *evocatio* from the magistrate could be sued out.¹ But the earlier jurists treated the duty to testify in private suits simply as a private obligation;² while in Justinian's time it was regarded as absolute and unconditioned.³ To the canon law we owe in this respect, in some jurisdictions the substance, in others, the form as well as the substance, of our present practice. In civil suits, by the canon law, a monition may be sued out to require the attendance of a witness; in penal cases, for the *monere a cogere* is substituted.⁴ To compel obedience to a monition, when neglected, are issued ecclesiastical censures, suspension, or excommunication; and *in foro laico*, *muletæ*, *pignoris capio*, and similar penalties.⁵

§ 377. A *subpoena ad testificandum* is a writ issued for the purpose of compelling the attendance of a witness at a judicial proceeding, whether at common law or equity.⁶ When the witness is required to produce papers, these must ordinarily be specified in the subpoena, which is then styled a *subpoena duces tecum*.⁷ The clerk or ens-

Duty of
persons
cognizant
of litigated
facts to tes-
tify.

Subpoena
the usual
mode of
enforcing
attendance
of witness.
For papers.

¹ See L. 26, xxviii. 1; L. iii. § 9; xliii. 5; Quinct. V. c. 7; Puchta, p. 200, note r; Endemann, 194.

² See authorities last cited.

³ L. 16, Cod. iv. 20; L. 19, Cod. iv. 20; Nov. 90, c. 8.

⁴ See Durant, I. 4, de test, § 13, No. 3.

⁵ Durant, I. c. § 13. A subpoena

may be issued by a legislature. Briggs v. Mackellar, 2 Abb. (Pr.) 30.

⁶ Hill v. Dolt, 7 De Gex, M. & G. 397; Mercant. Co. in re, L. R. 13 Eq. 179; Contract Co. in re, L. R. 6 Ch. Ap. 116; Mourning v. Davis, 2 Hayw. 219.

⁷ Amey v. Long, 9 East, 473; Cent. Nat. Bk. v. Arthur, 2 Sweeny, 191; Erie R. R. v. Heath, 8 Blatch. 413;

a subpoena
duces te-
cum issues.

todian of public records cannot, indeed, be in this way compelled to produce such records, they not being within his power.¹ But it is enough, in other cases, if the papers are in the possession of the witness, though the right to them belong to other persons. If he possess them, he may be compelled by subpoena to bring them into court.² Whether he will be compelled to produce such papers, is a matter to be subsequently determined by the court. Bring them into court he must, if they be in his possession, and they are demanded by subpoena.³ But the papers must be duly designated; a notice to produce all papers relative to the issue will not be enough.⁴ And they must be made to appear to be under the witness's control.⁵ A witness neglecting to obey the writ is liable not merely to attachment but to a suit for damages.⁶ A party is open to a subpoena,⁷ and may be required to produce his books and papers, without a previous rule or order of court, by a *subpoena duces tecum*.⁸ To corporations, however, this does not apply.⁹

§ 378. A witness in a civil case (the practice being otherwise in criminal) is entitled to have due notice in order to refresh his memory and arrange his business so as to enable him to testify; and hence, if called upon without notice upon his happening to be in the court, he is

Witness
may de-
cline an-
swering
unless sub-
pœnaed.

Murray v. Elston, 23 N. J. Eq. 212; O'Toole's Est. 1 Tuck. (N. Y.) 39; Townshend v. Townshend, 7 Gill, 10; Martin v. Williams, 18 Ala. 190.

¹ Austin v. Evans, 2 M. & Gr. 430; Thornhill v. Thornhill, 2 Jac. & W. 347.

² Amey v. Long, 1 Camp. 14.

³ Ibid.; Bull v. Loveland, 10 Pick. 9; Burnham v. Morrissey, 14 Gray, 226; Chaplain v. Briscoe, 13 Miss. 198. See, further, as to practice, supra, § 150.

⁴ Atty. Gen. v. Wilson, 9 Sim. 526; Lee v. Angus, L. R. 1 Eq. 59. Where the writ is directed to an officer of a telegraph company, to produce certain messages, it need only describe the messages with such practicable certainty that the witness may know

what is required of him. United States v. Babcock, 3 Dillon, 566.

⁵ Bank of Utica v. Hillard, 5 Cow. 153.

⁶ Robinson v. Trull, 4 Cush. 249; Lane v. Cole, 12 Barb. 680; Hasbrouck v. Baker, 10 Johns. R. 248; Hurd v. Swan, 4 Denio, 75; McCall v. Butterworth, 8 Iowa, 329; Prentiss v. Webster, 2 Douglass (Mich.), 5; Connett v. Hamilton, 16 Mo. 442.

⁷ Anderson v. Johnson, 1 Sandf. 713; though see Gambrill v. Parker, 31 Md. 1; Bleeker v. Carroll, 2 Abb. (Pr.) 82.

⁸ Trotter v. Latson, 7 How. Pr. 261; People v. Dyckman, 24 How. Pr. 222; Duke v. Brown, 18 Ind. 111, *contra*. See *infra*, § 439.

⁹ Central Bk. v. White, 37 N. Y. Sup. Ct. 297.

ordinarily entitled to decline on the ground that he was not served with a subpœna.¹ How long a notice the subpœna must give, depends upon the circumstances of the particular case. If the issue allow time enough, and if the existence and residence of the witness be known to the party desiring his attendance, the courts will not issue an attachment against him for non-attendance on a subpœna served on him the day of the trial.² If, however, he be on regular attendance, though without having been served with a subpœna, and no laches are imputable to the party summoning him, then he cannot avail himself of the shortness of the summons as an excuse for non-testifying.³ Nor where the name or residence of an important witness only becomes known to the party on trial, can it be supposed that a court would do otherwise than sustain process for compelling such witness immediately to testify.⁴

§ 379. By the English practice it is sufficient to leave a copy of the substance of a subpœna, which is called a subpœna ticket, with the witness. This, however, must be done personally ; ^{Subpœna must be served personally.} and the original writ must be shown to the witness at the time the copy or the ticket is left with him.⁶ Any substantial variance between the ticket and the subpœna precludes the summoning party from obtaining an attachment.⁷

§ 380. By the stat. 5 Eliz. c. 9, a witness is entitled to his "reasonable costs and charges." What charges are reasonable is arbitrarily settled in many states by statute. In England, with greater consideration, the common law courts have adopted a graduated scale, suitable to the sacrifices of time made by witnesses in obeying the summons.⁸ But where foreign witnesses, or witnesses in any way out of the jurisdiction of the court, are brought in, special

¹ *Bowles v. Johnson*, 1 W. Bl. 36.

² *Barber v. Wood*, 2 M. & Rob. 172; *Hammond v. Stewart*, 1 Str. 510, and cases cited *infra* § 381.

³ *Doe v. Andrews*, 2 Cowp. 845; *Jackson v. Seagar*, 2 Dow. & L. 13.

⁴ See *Wisden v. Wisden*, 6 Beav. 549.

⁵ *Pyne, in re*, 1 Dow. & L. 703; *Doe v. Andrews*, 2 Cowp. 846.

⁶ *Garden v. Creswell*, 2 M. & W. 319; *Wadsworth v. Marshall*, 1 C. & M. 87; *Marshall v. R. R.* 11 C. B. 398.

⁷ *Chapman v. Davis*, 4 Scott N. R. 319; *S. C.* 3 M. & Gr. 609; *Doe v. Thomson*, 9 Dowl. 948.

⁸ See *Taylor on Evidence*, § 1126.

allowances to them will be sustained by the court as part of the taxable costs; ¹ and so where persons have been detained in the country, at great inconvenience to themselves, but great benefit to public justice, in order to give evidence on trial.² Extraordinary causes, also, may justify extraordinary costs.³ Even a party's fees as a witness may, under peculiar circumstances, be allowed.

§ 381. In civil cases, an attachment will not issue to compel attendance unless the reasonable expenses of the witness, as such expenses are legally defined, have been paid, or at least tendered to him in advance of trial.⁴ The same practice exists in equity suits.⁵ Directly or indirectly, however, a witness may waive his claim to such remuneration.⁶

§ 382. Wilful non-attendance by a witness, when duly summoned, is a contempt of court, being in itself an offence against public justice.⁷ The summons, however, to constitute such contempt, must be shown to have been regularly made, with due time to prepare for attendance.⁸ In civil cases, proof must be made of the payment to the witness of his taxable fees, or at least of the tender of such fees,⁹ unless such tender be waived.¹⁰ Due service also requires, as we have seen, that the writ should be exhibited to

¹ *Tremain v. Barrett*, 6 Taunt. 88; *Lonergan v. Ass. Co.* 7 Bing. 725.

² *Stewart v. Steele*, 4 M. & Gr. 669.

³ *Beaufort v. Ashburnham*, 13 C. B. N. S. 598; *Potter v. Rankin*, L. R. 5 C. P. 518; *Berry v. Pratt*, 1 B. & C. 276. See, as limiting this to intra-territorial mileage, *White v. Judd*, 1 Metc. (Mass.) 293; *Howland v. Lenox*, 4 Johns. 311.

⁴ *Brocas v. Lloyd*, 23 Beav. 129; *Newton v. Harland*, 1 M. & Gr. 956; *Betteley v. McLeod*, 3 Bing. N. C. 415; *Thomas, in re*, 1 Dillon, 420.

⁵ *Gresl. Eq. Ev.* 59; *Cast v. Poyser*, 3 Sm. & G. 369.

⁶ *Newton v. Harland*, 1 M. & Gr. 956; *Betteley v. McLeod*, 3 Bing. N. C. 405.

⁷ 2 Wait's Pr. 722; *Borrow v. Humphreys*, 8 B. & A. 600; *Burr's Trial*, 354; *Judson, ex parte*, 3 Blatch. 89, 148; *Roelker, ex parte*, 1 Sprague, 276; *Cent. Nat. Bk. v. Arthur*, 2 Sweeny, 194; *Langdon, ex parte*, 25 Vt. 680; *Walker, ex parte*, 25 Ala. 81. See *Thompson v. R. R.* 22 N. J. Eq. 111.

⁸ See *Scholes v. Hilton*, 10 M. & W. 15; *Garden v. Creswell*, 2 M. & W. 319; *Hill v. Dolt*, 7 De Gex, M. & G. 397; *Fricker's case*, L. R. 13 Eq. 178; *Scammon v. Scammon*, 33 N. H. 52. See, however, *Chicago R. R. v. Dunning*, 18 Ill. 494.

⁹ *Brocas v. Lloyd*, 23 Beav. 129; *Newton v. Harland*, 1 M. & Gr. 956.

¹⁰ *Goff v. Mills*, 2 Dow. & L. 23. As to extent of fees, see *supra*, § 380.

the witness, and either a copy, or a ticket giving its substance, left with him.¹ It has been said that it is essential, in order to obtain an attachment, to prove that the witness wilfully refused to attend.² But wilfulness is to be assumed from the very fact of non-attendance after summons; and ordinarily it is enough for a party to prove such summons, with payment or tender of fees, in order to obtain a rule to show cause why an attachment should not issue. If otherwise, there would be no way of bringing negligent witnesses into court.³ If the testimony of the witness, however, is immaterial, and there be no contempt shown, the attachment may be refused.⁴

§ 383. In this country the practice in many jurisdictions is to grant an attachment at once upon proof of due service of the subpœna as above expressed.⁵ The witness, in such case, on appearing in court, and purging his contempt, and paying costs, is entitled to be discharged from custody. In England, the course is for the summoning party to apply first for a rule to show cause, which is granted on *ex parte* proof.⁶ Yet where the delay incident on such a rule would be pernicious to the case of the summoning party, the rule, if not dispensed with, may be shaped in such a way as to secure almost immediate attendance. When it appears, upon a rule to show cause, that the witness is too ill to attend,⁷ or is in any other way incapacitated,⁸ or has been led to believe that his attendance was not really required,⁹ the rule will be discharged. But in other cases it will be granted at the discretion of the court, upon due proof of service, and of its disregard.¹⁰

Attachment granted on rule to show cause.

§ 384. When a witness is in prison, his attendance may be

¹ *Marshall v. R. R.* 11 C. B. 398; *Garden v. Creswell*, 2 M. & W. 319; *Smith v. Truscott*, 1 D. & L. 530.

² See *Scholes v. Hilton*, 10 M. & W. 15; *Netherwood v. Wilkinson*, 17 C. B. 226.

³ *Jackson v. Seager*, 2 Dowl. & L. 13.

⁴ *Dicas v. Lawson*, 1 Cr., M. & R. 934; *Scholes v. Hilton*, *ut supra*.

⁵ See *Jackson v. Mann*, 2 Caines, 92.

⁶ *Taylor's Evidence*, § 1145.

⁷ *Farrah v. Keat*, 6 Dowl. 470; *Jackson v. Perkins*, 2 Wend. 308; *Cutler v. State*, 42 Ind. 244; *Slaughter v. Birdwell*, 1 Head, 344. See *Pipher v. Lodge*, 16 Serg. & R. 244.

⁸ *State v. Benjamin*, 7 La. An. 47.

⁹ *R. v. Sloman*, 7 Dowl. 693; *State v. Nixon*, *Wright (Ohio)*, 763; *Beaulien v. Parsons*, 2 Minn. 37.

¹⁰ *Judson, ex parte*, 3 Blatch. 89; *State v. Trumbull*, 1 Southard, 139; *Stephens v. People*, 19 N. Y. 549; *West v. State*, 1 Wise. 209.

secured by a *habeas corpus ad testificandum*.¹ To this writ it is ordinarily a prerequisite that the party desiring the attendance of the witness should make affidavit before a judge at chambers that the witness in question is material to the case, but is in custody, whether on criminal or civil process.² In England, at common law, it has been doubted whether the writ should be granted to bring into court a prisoner of war.³ The proper course, it was thought by Lord Mansfield, was to make application to the secretary of state; though if the latter functionary should decline to grant the desired relief, a rule would be granted by the court to show cause why the adverse party should not admit the facts, or, as an alternative, consent to examining the witness by commission. If this consent was refused, it was intimated that the court would put off the trial to enable the applicant to proceed by bill of discovery. A party to the record, who is entitled to testify in the case, if he be in prison, is entitled to use this writ in order that he may himself be brought into court.⁴ The same writ has been issued to secure the presence in court of a person confined as a lunatic.⁵ But where the desired witness is out of the jurisdiction of the court, the writ will not be granted where there is an opportunity to take the witness's deposition.⁶

§ 385. It may happen that suspicions exist that a witness may disappear, or be spirited away, before trial. If so, in criminal cases, and, when allowed by statute, in civil cases, he may, on due ground laid, be held to bail, to appear at the trial, and may be committed on failure to procure bail.⁷ Such imprisonment does not violate the sanctions of the federal or state constitutions.⁸ By statutes in the United States and in several of the particular states, this right is

¹ See *R. v. Roddam*, Cowp. 672; *State v. Kennedy*, 20 Iowa, 372.

² Chitty, Forms, 60; *Marsden v. Overbury*, 18 C. B. 34; *Gordon's case*, 2 Maule & S. 580; *Browne v. Gisborne*, 2 Dowl. N. S. 263; *Graham v. Glover*, 5 E. & B. 591.

³ *Furly v. Newnham*, 2 Dong. 419.

⁴ *Cobbett*, ex parte, 4 Jur. N. S. 145.

⁵ *Fennell v. Tait*, 1 C., M. & R. 584.

⁶ *Koecker v. Koecker*, 7 Philadel. R. 364.

⁷ *U. S. v. Butler*, 1 Cranch C. C. 422; *Evans v. Rees*, 12 Ad. & El. 55; *Ashton's case*, 7 Q. B. 169; *State v. Zellers*, 7 N. J. Law (2 Halst.), 220. See, however, *Birkley v. Com.* 2 J. J. Marsh. 572, where it is said that the court cannot compel the witness to give surety.

⁸ *State v. Grace*, 18 Minn. 398.

affirmed; ¹ but in states having common law jurisdiction, it exists, in criminal cases, at common law.²

II. OATH AND ITS INCIDENTS.

§ 386. An oath is defined by Savigny to be the assurance of the truth of an assertion by an appeal to an object (Gegenstand), which is regarded by the person swearing as high and holy.³ Mr. Best⁴ gives a narrower definition, holding that "an oath is an application of the religious sanction;" and that it is "calling the Deity to witness in aid of a declaration by man." To this effect he quotes Lord Coke,⁵ and Bonnier,⁶ who declares "*Le serment est l'attestation de la Divinité à l'appui d'une déclaration de l'homme.*" Yet if we are now to regard an affirmation as equivalent, when given under the same sanction, to an oath, and if we accept the rulings which permit atheists to testify under affirmation, we must fall back on Savigny's definition as more fully in correspondence with the present state of the law. It is worth while, in this view, to remember that the Romans allowed a wide margin in the objects to which such appeal could be made. An oath, for instance, could be "*per salutem tuam, per caput tuum, vel filiorum, per genium principis,*" even "*proprie superstitione,*" though not "*improbatae publice religionis,*" which oath was forbidden, and was held void.⁷ After the establishment of Chris-

An appeal to a higher sanction.

¹ The federal stat. of Aug. 8, 1846, § 7 (Brightly, 267), authorizes this in "any criminal cause or proceeding in which the United States shall be a party or interested."

² It has been held in England, that where a married woman, who could not enter into her own recognizance, refused either to appear at the sessions or to find sureties for her appearance, she could be committed, in order that she might be forthcoming as a witness at the trial. *Bennet v. Watson*, 3 M. & Sel. 1. It is also argued that a recognizance to prosecute or give evidence is binding on an infant; and it has been held that infancy is no ground for discharging a forfeited re-

cognizance to appear at the assizes to prosecute for felony; *Ex parte Williams*, 13 Price, 670; *M'Clell*, 493, S. C.; but the better opinion is, that a justice is not authorized to commit any witness for refusing to find sureties to be bound with him, provided he be willing to enter into his own recognizance. *Per Graham, B.*, as cited 2 Burn's Just. 122; *per Ld. Denman* in *Evans v. Rees*, 12 A. & E. 59; *Taylor's Ev.* § 1417.

³ Savigny, *Rom. Recht*, VIII. 48.

⁴ *Evidence*, § 57.

⁵ 3 Inst. 165.

⁶ *Traité des Preuves*, § 340.

⁷ L. 5, pr. § 1, 3; *De jur.* xii. 2.

tianity, and among Christians, the appeal was exclusively to God,¹ but in the present day, there is little doubt that even without a statute, a positivist, who holds to cosmical development, excluding a Divine Providence, would be allowed to testify upon affirmation.² But in any view, an appeal of this class, solemnly made, apart from the fact that falsehood uttered after such an appeal is indictable as perjury, gives an assurance, amounting to *primâ facie* proof, that the assertion made by the witness corresponds with his consciousness of right and truth, — “*Est enim iusjurandum affirmatio religiosa.*”³ It is final, so far as the case is concerned, for an oath is administered to a witness but once in a cause, no matter how often he may be recalled.⁴

¹ See *Com. v. Winnemore*, 2 Brewst. 378; Savigny, *ut supra*.

² See *infra*, § 395.

³ *Cic. de Off. iii.* 29.

⁴ *Bullock v. Koon*, 9 Cow. 30.

In the Roman law an oath may be used to give certainty either to a promise as to the future, or a statement as to the past.

An oath, when used for obligatory purposes to strengthen a promise to do something in the future, is called by the jurists, *iuramentum promissorium*. Under this head may be mentioned oaths of public officers, of executors and administrators, and of guardians; Savigny, *Röm. Recht*. VIII. 49; and the oaths of parties to be hereafter noticed.

Oaths, when used by witnesses as assurances of the truth of statements as to the past (including the witness's present belief as to past circumstances), are the ordinary prerequisites to the admission of witnesses to testify in courts of justice. It is true that by statute persons who conscientiously object to oaths are permitted, by our practice, to *affirm* instead of swearing to, the truth of their statements; but the difference between the affirmation so imposed, and the oath, is merely verbal.

A party could extra-judicially take

for certain uses in a cause in litigation a *iuramentum voluntarium*, or voluntary oath. To such oath he was not compelled; but he was entitled to make it in order to obtain certain processual advantages in the suit. See L. 31; L. 34, § 6, 9; xii. 2; L. 3-12; *Cod. h. t. iv.* 1. To such oaths we may liken our own affidavits for the purposes of obtaining continuances and new trials on the ground of after-discovered evidence. In the earlier Roman practice, such oaths might cover such admissions as to the merits of a case as might warrant a judgment. (See citations in last note.) The term *iuramentum voluntarium*, however, was generally used as convertible with our own voluntary non-processual affidavits, and could not in themselves be invested with contractual force. See L. 17, h. t. xii. 2.

In the same law, the imposition of the oath was originally, in civil cases, discretionary with the *judex*. By a decree of Constantine, the oath was obligatory in all cases, and was to be imposed before the examination. L. 9, C. iv. 20. By the canon law, which declared the oath to be an essential solemnity, *iuris gentium et iuris divini* (with this solemnity even the Pope could not dispense, see Mascard.

§ 387. At common law, the ceremonies the witness deems binding on his conscience are to be adopted in the imposition of the oath.¹ But the fact that a witness permits himself, without objection on his part, to be sworn by an oath he does not deem binding, does not relieve him from a prosecution for perjury, if his testimony be wilfully false.² When a witness, after being sworn, states that he considers the oath binding, he cannot afterwards be asked whether he considers another form of oath more binding.³ There is no reason why he should not be asked by the court as to his religious belief, without being sworn. His extra-judicial declarations to the same effect are admissible when proved by witnesses who heard him speak; *a fortiori* his declarations made in the presence of the court.⁴

Witness to be sworn in form he deems most obligatory.

§ 388. As a cumulative relief, statutes have been adopted in England and in the United States, enabling persons who are conscientiously opposed to take an oath, to testify under the form of a solemn affirmation.⁵ It is scarcely necessary to say that for false testimony given

Affirmations may be substituted for oaths.

c. 1362; Lanfranc, de Or. L. C. No. 1; Endemann, 229), the witness was to be sworn as a preliminary to his examination. Durant, L. 4, de test. § 4; Lanfranc, No. 6.

¹ Omichund v. Barker, Willes, 538; S. C. 1 Smith L. C. 381; The Merrimac, 1 Ben. 490; Fuller v. Fuller, 17 Cal. 605.

² Sells v. Hoare, 3 B. & B. 232; S. C. 7 Moore, 36; State v. Keene, 26 Me. 33; Com. v. Knight, 12 Mass. 274; Campbell v. People, 8 Wend. 636; Thomas v. Com. 2 Rob. 795; State v. Witherow, 3 Murph. 153; McKinney v. People, 7 Ill. 540. See Whart. Cr. Law, § 2205.

³ Queen's case, 2 B. & B. 284.

⁴ See Maden v. Catanach, 7 H. & N. 360; R. v. Serva, 2 C. & K. 56. See *infra*, § 543.

⁵ The English statute, passed in 1869, provides that "if any person called to give evidence in any court of justice . . . shall object to take an oath, or shall be objected to as in-

competent to take an oath, such person shall, if the presiding judge is satisfied that the taking an oath would have no binding effect on his conscience, make 'a solemn promise and declaration;' and then, if false evidence be wilfully and corruptly given by him, he shall be liable to indictment for perjury." The form adopted under the act is: "I solemnly promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth." Such statutes, however, as Mr. Taylor (Taylor's Evidence, § 1218) justly observes, leave the religious faith of a proposed witness still open to inquiry by the courts. For, first, the person called as a witness must either object to take an oath, or be objected to as incompetent; and, next, the judge is required to satisfy himself that the taking the oath by such person would have no effect on his conscience.

under an affirmation, the witness is as much exposed to a prosecution for perjury as if he had been formally sworn.¹ But the right to be affirmed, in those states which make conscientious objections the test, cannot be granted to a witness who has no conscientious objection to an oath.²

III. PRIVILEGE FROM ARREST.

§ 389. A witness, when on attendance on a court of justice, is not protected from arrest on a criminal prosecution.³ From arrest on civil process a witness is protected, not only while in attendance on the court, but when going to and returning from it; in other words, *eundo, morando, et redeundo*. The rule is the same whether the witness attends voluntarily or on compulsion, and whether the tribunal he attends be a court and jury, or a commissioner or other officer authorized to take testimony.⁴ A *summons*, by the English practice, will not be set aside because it is served on a witness during his attendance on court;⁵ though to serve such a writ on the witness, in the presence of the court on which the witness is in compulsory attendance, may be a contempt of the latter tribunal.⁶ A summons served under such circumstances may be set aside, also, if it appears that the attendance of the witness, a resident of another state, was secured in order to bring him within the range of the summons. "It is the policy of the law," so it is said, "to protect suitors and witnesses from arrests upon civil process while coming to and attending the court, and while returning home, and their immunity from the service of

¹ See *U. S. v. Coolidge*, 2 Gall. 364.

² *Williamson v. Carroll*, 16 N. J. L. 217.

³ *Douglass*, in re, 3 Q. B. 837.

⁴ *Meekins v. Smith*, 1 H. Bl. 636; *Rishton v. Nisbett*, 1 M. & Rob. 347; *Willingham v. Matthews*, 6 Taunt. 358; *Walpole v. Alexander*, 3 Dong. 45; *Temple*, ex parte, 2 Ves. & B. 395; *Strong v. Dickenson*, 1 M. & W. 491; *Kimpton v. R. R.* 9 Ex. R. 766; *Pitt v. Coomes*, 5 B. & Ad. 1078; 3 N. & M. 212; *Spencer v. Newton*, 6 A. & E. 623; *Persse v. Persse*, 5 H. of

L. Cas. 671; *Gibbs v. Newton*, 6 A. & E. 623; *Jewett*, in re, 33 Beav. 559; *Wood v. Neale*, 5 Gray, 538; *Sanford v. Chase*, 3 Cow. 381; *Seaver v. Robinson*, 3 Duer, 622; *Ballinger v. Elliott*, 72 N. C. 596. See *Rogers v. Bullock*, 2 Pening. 516; *Marshall v. Carhart*, 20 Ga. 419.

⁵ *Poole v. Gould*, 1 H. & N. 99.

⁶ *Cole v. Hawkins*, 2 Str. 1094; *Poole v. Gould*, 1 H. & N. 100; *Arding v. Flower*, 8 T. R. 534. See *Blight v. Fisher*, 1 Pet. C. C. 41; *Miles v. McCullough*, 1 Binn. 77.

process for the commencement of civil actions against them is absolute, *eundo, morando, et redeundo*." Accordingly, where a summons was served upon a resident of another state, while attending in New York in good faith as a witness, it was held that an order setting aside the summons was proper and should be affirmed.¹ The privileges of witnesses attending before a committee of Congress cover immunity from arrest, but not, it is said, from civil service.²

§ 390. It has been held in this country that a witness may waive his privilege, and by submitting to be taken into custody without protest, lose his right to proceed against those by whom he is imprisoned.³ In England, on the ground that the privilege is one belonging to the courts, and not to the individual, a witness, after an unlawful arrest of the character above mentioned, does not, by any subsequent laches of his own, lose his right of redress for the illegal imprisonment.⁴ When, however, the interests of other parties are imperilled by a long delay in an application for release by a party so arrested, the courts may refuse to grant the application.⁵

Witness may waive his privilege from arrest.

IV. WHO ARE COMPETENT WITNESSES.

§ 391. While credibility is for the jury, under the instructions of the court, competency is exclusively for the court. Whatever may be the objection to the competency of a witness, whether interest, insanity, infancy, or public policy, if it goes to incompetency for the purpose for which the witness is called, it must be determined by the judge. Ordinarily, as we will presently see, the objection must be taken, when known, before the witness is sworn. In order to substantiate the objection, the witness, as we will see, may be exam-

Competency is for court.

¹ *Person v. Pardee*; Opinion by Allen, J., decided April 28, 1866, N. Y. Ct. of Appeals. See *McNeil*, ex parte, 6 Mass. 264; *Cole v. McClellan*, 4 Hill, 59; *Sanford v. Chase*, 3 Cow. 381; *Dixon v. Ely*, 4 Edw. Ch. 557; *Seaver v. Robinson*, 3 Duer, 622; *Merrill v. George*, 23 How. Pr. 331.

² *Wilder v. Welsh*, 1 McArthur, 566.

³ *Brown v. Getchell*, 11 Mass. 11; *Geyer v. Irwin*, 4 Dall. 107.

⁴ *Magnay v. Burt*, 5 Q. B. 393; *Cameron v. Lightfoot*, 2 W. Black. 1193; *Webb v. Taylor*, 1 Dowl. & L. 684.

⁵ *Andrews v. Martin*, 12 C. B. (N. S.) 372; *Greenshield v. Pritchard*, 8 M. & W. 148.

ined, according to the old practice, on the *voir dire*; or being sworn in chief, his examination may be arrested by interrogations from the opposite party, as to his competency.¹ But by the court must the objection, whenever it is made, be determined.²

§ 392. The law on grounds of policy, presumes that all witnesses tendered in a court of justice are not only competent but credible. If a witness is incompetent, this must be shown by the party objecting to him;³ if he is not credible, this must be shown, either from his examination, or by impeaching evidence *aliunde*.⁴ Hence, so far as competency is concerned, if the evidence is in equipoise, the witness should be admitted.⁵

§ 393. A party who knows objections to the competency of a witness cannot, so it has been held, hold back such objections until the witness has been examined, and then raise the objections if the witness's testimony prove unfavorable.⁶ But it is otherwise when the objecting

¹ See *infra*, § 492.

² See cases cited *infra*; and see *R. v. Perkins*, 2 Mood. C. C. 135; *State v. Whittier*, 21 Me. 341; *Dole v. Thurlow*, 12 Mete. 157; *Com. v. Burke*, 16 Gray, 33; *Cook v. Mix*, 11 Conn. 432; *Com. v. Lattin*, 29 Conn. 389; *Reynolds v. Lounsbury*, 6 Hill, 534; *State v. Catskill Bk.* 18 Wend. 466; *Perry's case*, 3 Grat. 632; *Rohrer v. Morningstar*, 18 Oh. 579; *Draper v. Draper*, 68 Ill. 17; *Peterson v. State*, 47 Ga. 524; *Chouteau v. Searcy*, 8 Mo. 733; *State v. Scanlan*, 58 Mo. 204; *Anderson v. Maberry*, 2 Heisk. 653. See *Johnson v. Kendall*, 20 N. H. 304, intimating that where doubts as to competency arise during the examination, though the question is primarily for the court, it may be ultimately submitted to the jury. *S. P., Lee v. Welsh*, 1 Weekly Notes of Cases, 453.

³ *Carrington v. Holabird*, 17 Conn. 536; *Snyder v. May*, 19 Penn. St. 235; *Pegg v. Warford*, 7 Md. 582; *Dens-*

ler v. Edwards, 5 Ala. 31; *Richardson v. Hage*, 24 Ga. 203.

⁴ See *infra*, § 551 *et seq.*; *Willey v. Portsmouth*, 35 N. H. 303.

⁵ *Johnson v. Kendall*, 20 N. H. 304; *Duel v. Fisher*, 4 Denio, 515; *Watts v. Garrett*, 3 Gill & J. 355. See, however, *Story v. Saunders*, 8 Humph. 663.

⁶ *Howell v. Lock*, 2 Camp. 14; *R. v. Frost*, 9 C. & P. 183; *Dowdney v. Palmer*, 4 M. & W. 664; *Stuart v. Lake*, 33 Me. 87; *Com. v. Green*, 17 Mass. 515; *Donelson v. Taylor*, 8 Pick. 390; *Lewis v. Morse*, 20 Conn. 211; though see *Needham v. Smith*, 2 Vern. 463; *Yardley v. Arnold*, C. & M. 437; *Jacobs v. Layburn*, 11 M. & W. 685; *Heely v. Barnes*, 4 Denio, 73; *Howser v. Com.* 51 Penn. St. 332; *Baughner v. Duphorn*, 9 Gill, 314; *Groshon v. Thomas*, 20 Md. 234; *Hudson v. Crow*, 26 Ala. 515; *Drake v. Foster*, 28 Ala. 649; *Levering v. Langley*, 8 Minn. 107.

party is not aware of the full force of the objection until the examination has begun.¹ The objection, however, if discovered during the examination in chief, must be made before cross-examination.² When a witness, after verdict, is discovered to have been incompetent, and this without any laches on the part of the objecting party, a new trial may be granted, if the evidence of the witness was material, or if the party offering this evidence is tainted with suspicion of impropriety in concealing the incompetency.³ But where the objection could have been taken during the trial, a new trial will be refused, nor can the objection be noticed on error.⁴

§ 394. The distinction between secondary and primary evidence, which is applied to written instruments, is not applicable to witnesses. A copy of an instrument cannot be received as long as the original is attainable; when the best documentary evidence is to be had, an inferior medium for the transmission of the same subject matter will be rejected. It is otherwise, however, when we come to compare witnesses with each other; a witness of weak memory or of bad reputation will not be excluded because a witness remarkable for veracity and clear headedness is kept back. A witness, no matter how reliable, cannot be permitted to give the contents of a written instrument that could be produced; but no witness, no matter how unreliable, can be excluded because another, more authoritative, is not called.⁵ A witness who has heard A. say certain things can be received, though A. himself might have been examined, but is not;⁶ and

Distinction between secondary and primary does not apply to witnesses.

¹ See *R. v. Whitehead*, L. R. 1 C. C. 33; *S. C.* 10 Cox, 234; *Vaughan v. Worrall*, 2 Madd. 322; *Selway v. Chappell*, 12 Sim. 113; *State v. Damery*, 48 Me. 327; *Shurtleff v. Willard*, 19 Pick. 202; *Andre v. Bodman*, 13 Md. 241; *Veiths v. Hagge*, 8 Iowa, 163.

² *Sheridan v. Medara*, 10 N. J. Eq. 469; *Brooks v. Crosby*, 22 Cal. 42.

³ *Wade v. Simeon*, 2 C. B. 342. See *Whart. Cr. L.* § 3334.

⁴ *Turner v. Pearte*, 1 T. R. 717; *Essex Bk. v. Rix*, 10 N. H. 201; *Jack-*

son v. Barron, 37 N. H. 494; *Snow v. Batchelder*, 8 Cush. 513; *Spaulding v. Hallenbeck*, 35 N. Y. 204; *Rees v. Livingston*, 41 Penn. St. 113; *McInroy v. Dyer*, 47 Penn. St. 118; *House v. House*, 5 Ind. 237; *State v. Scott*, 1 Bailey, 270.

⁵ See *supra*, § 90. *Governor v. Roberts*, 2 Hawks, 26; *Green v. Cawthorn*, 4 Dev. L. 409.

⁶ *Badger v. Story*, 16 N. H. 168; *Featherman v. Miller*, 45 Penn. St. 96.

hence the admissions of a party can be proved, though the party himself is in court to be examined as to such admissions.¹

§ 395. By the English common law, the oath was an essential prerequisite to the admission of a witness to testify. *In judicio non creditur nisi juratis.*² In the leading case on this topic³ the question came up on the admissibility in evidence of depositions which had been made on oath by some Gentoos before a chancery commission in the East Indies. It had been thought, up to that time, on the authority of Coke,⁴ that none but Christians were competent witnesses. He had laid it down that "an infidel cannot be a witness;" and it was clear that, under the designation of infidel, he classified all who were not Christians. But Willes, C. J., ruled that Lord Coke's proposition was "without foundation, either in Scripture, reason, or law;" and proceeded to declare, in an opinion which has not since been questioned, that "Such infidels who believe in God, and that He will punish them if they swear falsely (in some cases and under some circumstances), may and ought to be admitted as witnesses in this, though a Christian country." And, "Such infidels, if any such there be, who either do not believe in God, or, if they do, do not think that he will either reward or punish them in this world or in the next, cannot be witnesses under any case or under any circumstances, for the plain reason, because an oath cannot possibly be any tie or obligation upon them."⁵ It may therefore be regarded as settled that by the Anglo-American common law an atheist is inadmissible as a witness, independently of the statutes permitting affirmations to be substituted for oaths;⁶ though it is sufficient for admissibility, that the witness proposed believes in a Supreme Being who dispenses retribution in this life alone.⁷

¹ *Infra*, § 1175 *et seq.*

² 2 Salk. 512; 1 Bl. Com. 402.

³ *Omichund v. Barker*, Willes, 538;

⁴ 1 Sm. L. C. 194.

⁵ Co. Litt. 6, b.

⁶ See *Maden v. Catanach*, 7 H. & N. 360; 31 L. J. Ex. 118.

⁷ *Maden v. Catanach*, 7 H. & N. 360; *Smith v. Coffin*, 18 Me. 157; *Norton v. Ladd*, 4 N. H. 444; *Arnold v. Arnold*, 13 Vt. 363; *Thurston v.*

Whitney, 2 Cush. 104; *Beardsly v. Foot*, 2 Root, 399; *Atwood v. Welton*, 7 Conn. 66; *People v. McGarren*, 17 Wend. 460; *Anderson v. Maberry*, 2 Heisk. 653. Otherwise, when an affirmation is permitted. *Supra*, § 386.

⁷ *Omichund v. Barker*, Willes, 538; *Wakefield v. Ross*, 5 Mason, 18; *U. S. v. Kennedy*, 3 McLean, 175; *Hunscom v. Hunscom*, 15 Mass. 184; *Butts v. Swartwood*, 2 Cow. 431; *People v.*

By statute, however, in England and in most parts of the United States, religious disbelief no longer disqualifies; nor at common law can defect in such belief be a ground of exclusion in jurisdictions which permit the substitution of an affirmation for an oath.¹

§ 396. Where religious disbelief operates to incapacitate, the burden is on the party endeavoring thus to exclude a witness, all persons being presumed to have a religious belief such as entitles them to be sworn.² It is competent, under such a rule, at any time before the witness is sworn, to introduce testimony to show his defect in this relation.³ Whether he can himself be examined on his *voir dire* as to his religious belief has been doubted. The affirmative has

Evidence may be taken as to religious belief.

Matteson, 2 Cow. 433; Brock v. Miligan, 10 Ohio, 125; Shaw v. Moore, 4 Jones L. 25; Jones v. Harris, 1 Strobh. 160; Blocker v. Burness, 2 Ala. 354; Cubbison v. McCreary, 2 Watts & S. 262; Bennett v. State, 1 Swan, 411; Blair v. Seaver, 26 Penn. St. 274.

¹ Supra, § 386. Com. v. Burke, 16 Gray, 33; Perry's case, 3 Grat. 632; People v. Jenness, 5 Mich. 305; Fuller v. Fuller, 17 Cal. 605.

The following summary of the older cases may be still not without value: In Pennsylvania, it was directly decided that the true test of the competency of a witness, on the ground of his religious principles, is, whether he believes in the existence of a God who will punish him if he swear falsely. Cubbison v. McCreary, 2 W. & S. 262. See Com. v. Winnemore, 2 Brewster, 378; Blair v. Seaver, 26 Penn. St. 274. Hence those are competent who believe future punishment not to be eternal. Cubbison v. McCreary, 2 W. & Serg. 262. See Butts v. Swartwood, 2 Cowen, 431; Blocker v. Burness, 2 Ala. 354; U. S. v. Kennedy, 3 McLean, 175. In Ohio, it is held that a witness's belief that punishments for false swearing are inflicted in this life only, might go to his cred-

ibility. U. S. v. Kennedy, 3 McLean, 175. In Connecticut, it was formerly decided that those who believe in a God, and in rewards and punishments only in this world, are not competent witnesses. Atwood v. Welton, 7 Conn. R. 66. The legislature of that state has since enacted that such persons shall be received as witnesses. In Massachusetts, it has been said that mere disbelief in a future existence goes only to the credibility. Hunsecom v. Hunsecom, 15 Mass. 184. In Maine, a belief in the existence of the Supreme Being is rendered sufficient, without any reference to rewards or punishments. Stat. 1833, c. 68; Smith v. Collin, 6 Shep. 157. In South Carolina, a belief in God and his providence has been held sufficient. Jones v. Harris, 1 Strob. 160. In Illinois it has been said that a person who has no religious belief, nor belief in a Supreme Being, and who, though recognizing his amenability to human law, in case he testifies falsely, has no sense of moral accountability, is inadmissible. Central Mil. R. R. v. Rockafellow, 17 Ill. 541.

² Donnelly v. State, 26 N. J. L. 463.

³ Anderson v. Maberry, 2 Heiskell, 653. See infra, § 513.

sometimes been maintained,¹ but without reason; for it is a *petitio principii* to swear a person in order to determine whether he can be sworn.² But a witness cannot, in any view, be compelled to answer as to special phases of his creed.³ To prove such defect in religious belief as argues a deficiency in a sense of moral accountability, the proper course is to put in evidence the witness's own declarations.⁴ If the witness has changed his opinion, this cannot be proved by examining him. Declarations, exhibiting such change of opinion, may be shown by those to whom such declarations were uttered.⁵

§ 397. At common law, persons convicted of crimes which render them infamous are excluded from being witnesses. "Infamous" crime in this sense is regarded as comprehending *treason, felony*, and the *crimen falsi*.⁶ By statutes, however, adopted in England and in most of the United

Infamy incapacitates at common law.

¹ See *R. v. White*, 1 Leach, 430; *Maden v. Catanach*, 7 H. & N. 360; *R. v. Serva*, 2 C. & K. 56.

² *Queen's case*, 2 B. & B. 284; *U. S. v. White*, 5 Cranch C. C. 38; *Smith v. Coffin*, 6 Shepley, 157; *Com. v. Smith*, 2 Gray, 516; *Com. v. Burke*, 16 Gray, 33; *Com. v. Whinnemore*, 1 Brewst. 356; *State v. Townsend*, 2 Harring. 543. See *Odell v. Koppee*, 5 Heisk. 88.

³ *Donkle v. Kohn*, 44 Ga. 266. See *infra*, § 543.

"It has sometimes been allowed to counsel," says Mr. Justice Talfourd, "to question witnesses on their *voir dire* as to their religious belief; but it may be doubted whether a witness would not be justified in insisting, when so questioned, on the simple answer that he considers the oath administered in the usual form binding on his own conscience, and in declining to answer further; for a confession thus forced from him, of a disbelief in a state of retribution, would certainly be esteemed as disgraceful in a court of justice, and there seems no reason why a person should thus be taxed,

perhaps to his own infinite prejudice, merely because he appears to perform a public duty in obedience to a sub-pœna. At all events, it is quite clear that a witness may properly refuse to answer any questions which go beyond an inquiry into his belief in a Superior Being to whom man is answerable; and that it is the duty of counsel to refuse, however urged, to put such questions, which are altogether impertinent and vexatious." 6 Dick. Q. S. 535.

⁴ *Wakefield v. Ross*, 5 Mason, 19; *Central Mil. R. R. v. Rockafellow*, 17 Ill. 541; *Curtiss v. Strong*, 4 Day, 51; *Jackson v. Gridley*, 18 Johns. 98.

⁵ *U. S. v. White*, 5 Cranch C. C. 38; *Smith v. Coffin*, 6 Shepley, 157; *Com. v. Wyman*, Thacher C. C. 432; *Atwood v. Welton*, 7 Conn. 66; *Jackson v. Gridley*, 18 Johns. 98; *State v. Townsend*, 2 Harr. 543; *Com. v. Bachelor* 4 Am. Jur. 79.

⁶ *Phil. & Am. on Ev.* p. 17; 6 *Com. Dig.* 353, *Testm. A.* 4, 5; *Co. Litt.* 6 b; 2 *Hale P. C.* 277; 1 *Stark. Evid.* 94, 95; 1 *Greenl. on Evidence*, §§ 372, 373.

States, the disqualification of infamy is removed, but a conviction may be proved to affect credibility.¹

¹ *Com. v. Gorham*, 99 Mass. 420. In Massachusetts, see *Sup. Rev. Stat.* 607, 803. In New York, see *Donahue v. People*, 56 N. Y. 208. In Michigan, see *Dickinson v. Dustin*, 21 Mich. 561. In Ohio, *Brown v. State*, 18 Oh. St. 496. In Georgia, *Frain v. State*, 40 Ga. 529. See, as to impeaching witnesses in this way, *infra*, § 567. In New York, however, as late as 1869, all convictions of offences punishable by death or imprisonment in the state prison made the convict incompetent as a witness. See, as applying this provision, *People v. Park*, 41 N. Y. 21; *aff. S. C.* 1 Lans. 263.

As there are still states which retain the disqualification of infamy, and as in several states convictions of infamous offences can be introduced to impeach credibility, it may be proper to append, in this place, a summary of the rulings as to infamy.

A witness is rendered infamous by a conviction in the courts of his own country of a forgery; *R. v. Davis*, 5 Mod. 74; *Poage v. State*, 3 Oh. St. Rep. (N. S.) 239; perjury; *Greenl. Ev.* § 673; *R. v. Teal*, 11 East, 307; subornation of perjury; *Co. Lit.* 6 b; 6 *Com. Dig.* 353, *Testm.* A. 5; *Sawyer's case*, 2 Hale P. C. 141; suppression of testimony by bribery, conspiracy to procure the absence of a witness; *Clancy's case*, *Fortese. R.* 208; *Bushell v. Barratt*, *Ry. & M.* 434; or conspiracy to accuse another of crime; 2 Hale P. C. 277; 6 *Hawk. P. C. c.* 46, s. 101; *Co. Lit.* 6 b; *R. v. Priddle*, 1 Leach C. C. 442; *Crowther v. Hopwood*, 3 Stark. Rep. 21; 1 Stark. Evid. 95; *Ville de Varsovie*, 2 Dods. 191; and barratry; *R. v. Ford*, 2 Salk. 690; *Bull. N. P.* 292. But it is said not to be so with the mere at-

tempt to procure the absence of a witness. *State v. Keyes*, 8 Vermont, 57.

It is the infamy of the crime, and not the nature or mode of the punishment, that destroys competency; *Gilb. Evid.* 140; *Com. v. Shaver*, 3 Watts & Serg. 338; *Schnylkill v. Copley*, 67 Penn. St. 386; and, therefore, though a man had stood in the pillory for a libel, or for seditious words, or the like, he was not thereby disabled from being a witness; *Gilb. Evid.* 140, 141; 3 *Lev.* 426. Outlawry in a civil suit does not render a man incompetent as a witness; *Co. Lit.* 6 b; 2 *Hawk. c.* 46, s. 21; nor has the mere commission of any offence that effect, unless the party have been actually convicted of it. *Kel.* 17, 18; 1 *Sid.* 51; *Cowp.* 3. See 11 East, 309.

In Pennsylvania, a person convicted of arson in the night time of buildings or board yards in any city or incorporated district is incompetent to testify. Act April 16, 1849, *Pamph. L.* 664.

A conviction of grand or petit larceny disqualifies. *Pendock v. Mackinder*, *Willes R.* 665; *Com. v. Keith*, 8 Mete. 531; *State v. Gardner*, 1 Root, 485; *Lyford v. Farrar*, 11 Foster (N. H.), 314. In New York, however, the latter has been ruled to go only to the credibility of a witness. *Carpenter v. Nixon*, 5 Hill, 260.

If a statute declare the perpetrator of a crime "infamous," this, it seems, rendered him incompetent to testify. 1 *Phil. Evid.* p. 18; 1 *Gilb. Evid.* by Lofft, 256, 257.

In Massachusetts, it was said at common law that a person convicted of the offence of receiving stolen goods, knowing them to have been stolen, is not a competent witness. *Com. v. Rogers*, 7 Mete. 509. In

§ 398. To infancy is peculiarly applicable Burke's illustration of insanity, as applied by Lord Penzance, that while we know what is day and what is night, there is a region of twilight which we can neither call night or day. A child may be very far from maturity, yet

Admissibility of infants depends on intelligence.

Pennsylvania, however, the contrary doctrine has been advanced by a learned judge. *Com. v. Murphy*, 5 Penn. Law J. 22.

No disqualification, it was said by Judge Washington, attends a conviction of assault and battery with intent to kill; *U. S. v. Brockius*, 3 Wash. C. C. R. 99; nor, it was ruled by the supreme court of Pennsylvania, the conviction of a sheriff of the offence of bribing a voter previous to his election to the office. *Com. v. Shaver*, 3 Watts & Serg. 338.

A conviction of the offence of obtaining goods by false pretences does not render the party an incompetent witness; *Utley v. Merriek*, 11 Mete. 302; nor does a conviction for obstructing the passage of cars on a railroad; *Com. v. Dame*, 8 Cush. 384; nor for being a common prostitute; *State v. Randolph*, 24 Conn. 363; nor for keeping a gaming or bawdy house; *R. v. Grant*, 1 Ry. & M. 270; *Deer v. State*, 14 Missouri, 348; *Bickel v. Fasig*, 9 Casey, 463; nor for cutting timber; *Holler v. Ffirth*, Penning. 531; nor for conspiracy to defraud by spreading false news or otherwise; 1 Greenl. Ev. § 373; though the last point has been ruled differently by the United States circuit court in the District of Columbia. *U. S. v. Porter*, 2 Cranch C. C. R. 60.

Foreign convictions.—How far a foreign judgment of an infamous offence disables a witness has been the subject of much conflict of authority. In Massachusetts, it has been determined that such conviction does not attach disability; and, after an argu-

ment of remarkable learning and vigor, the court came to the conclusion that it was not bound to respect the criminal judgments of the courts, either of neighboring states or of a foreign country, though the record is admissible to discredit. *Com. v. Green*, 17 Mass. 515, 540. See, also, *Campbell v. State*, 23 Ala. 44. Such seems also to be the opinion of the late Mr. Justice Story; *Conflict of Laws*, §§ 91-93, 104, 620, 625; and of Mr. Greenleaf; 1 Greenl. on Ev. § 376. See, also, *State v. Ridgely*, 2 Har. & M'Hen. 120; *Clarke's Lessee v. Hall*, *Ibid.* 378; *Cole's Lessee v. Cole*, 1 Har. & Johns. 572. The force of the three last cited cases, however, is much weakened by the fact that in them the rejected witnesses were persons sentenced in England for felony, and transported as such to Maryland before the Revolution. In Virginia; *Uhl v. Com.* 6 Gratt. 706; and Alabama; *Campbell v. State*, 23 Ala. 44, the record is rejected altogether. The contrary opinion was held in North Carolina, after an elaborate examination, Hall, J., dissenting. *State v. Candler*, 3 Hawks, 393. In New Hampshire, a conviction in another state of a crime which by the laws of such state disqualifies the party from being heard as a witness, and which, if committed in New Hampshire, would have operated as a disqualification, is sufficient to exclude the party from being a witness. *Chase v. Blodgett*, 10 N. Hamp. 22. See *Hoffman v. Coster*, 2 Whart. 453; *U. S. v. Wilson*, Baldw. R. 90; *Jackson v. Rose*, 2 Virg. Cas. 34. See

he may be equally far from idiocy. His memory may be indistinct, but this peculiarity belongs to the old as well as to the young. He may be incapable of expressing himself with precision, but so are multitudes of witnesses whose competency is indisputable. On the other hand, he is comparatively free from those prepossessions by which the perceptive powers are distorted, and he is incapable of maintaining a consistent false narrative. It must be remembered, however, that these observations apply only to the border-land between infancy and maturity; to permit a child of two, three, or even four years, to be sworn and examined, would be trifling with public justice. Hence the dying declarations of a child of four years have been rejected;¹ and the admissibility of children of that age is generally questioned.²

Com. v. Hanlon, 3 Brewster, 461; *Kirschner v. State*, 9 Wisc. 140; *Wh. Confl. of Laws*, §§ 107, 769.

Verdict without judgment.—Conviction without judgment works no disability. *Com. v. Gorham*, 99 Mass. 420; *Com. Dig.* 354, *Testm. A.* 5; *R. v. Castell Carenlon*, 8 East, 77; *Lee v. Gansell*, *Cowp.* 3; *Bull. N. P.* 392; *Fitch v. Smallbrook*, *T. Raymond*, 32; *People v. Whipple*, 9 Cow. 707; *People v. Herrick*, 13 Johns. 82; *Cushman v. Loker*, 2 Mass. 108; *Skinner v. Perot*, 1 Ash. 57; *State v. Valentine*, 7 Ired. 225; *U. S. v. Dickenson*, 2 McLean, 325; *Dawley v. State*, 4 Indiana, 128.

Prisoners who have pleaded guilty, but on whom no sentence has been passed, are constantly admitted in practice as witnesses; and in one of these cases Baron Wood told the man that he would pass sentence upon him, upon his plea of guilty, because he fenced with the questions. *Alderson, B., R. v. Hincks*, 2 C. & K. 464; *S. C.* 1 Den. C. C. 84.

In Virginia, upon the trial of a convict from the penitentiary for a felony committed there, another convict confined there for felony is by statute a competent witness for the pros-

ecution. *Johnson's case*, 2 Gratt. 581.

Pardon.—Disability by infamy may be removed by the production of a pardon under the great seal. As to pardon, see fully *Whart. Cr. Law*, 7th ed. § 705.

¹ *Pike's case*, 3 C. & P. 598.

² *People v. McNair*, 21 Wend. 608. While there should be every caution observed as to the possibility of a child being tampered with by parents, or by those to whose influence they are particularly subjected, it should be observed that, so far as their own action is concerned, the ideas they receive are much more apt to be transferred unchanged to a third person, than those received by adults. "To them," it is well observed by Mr. Amos (*Great Oyer*, 277), "it is a matter of interest to pay particular attention to the precise words which people utter in their presence. They are usually passive recipients of other persons' ideas and expressions; whereas a grown person, when he hears a statement, is apt to content himself with the substance of it, and to modify it in his own mind, and may be afterwards unable to trace back his ideas to the original impressions."

On the other hand, the testimony of a child between four and five,¹ and of a child between six and seven, have been received on the trial of an indictment for an attempt to ravish.² Wherever there is intelligence enough to observe and to narrate, there a child, a due sense of the obligation of an oath being shown, can be admitted to testify.³

§ 399. The rule by which an infant under seven years of age cannot commit a felony, because the law presumes him conclusively not to have sufficient intelligence for the act, has no analogy in the law of evidence.⁴ Age, at least after four years are past, does not touch competency; and the question is entirely one of intelligence, which, whenever a doubt arises, the court, as we will presently see, will determine to its own satisfaction, by examining the infant on his knowledge of the obligation of an oath, and the religious and secular penalties of perjury. On the other hand, while tender age does not by itself exclude, an infant cannot, when wholly destitute of religious education, be made competent by being superficially instructed just before a trial, with a view to qualify him.⁵

§ 400. Competency in such case being for the court, the court may, by a preliminary examination, probe the witness's intelligence.⁶ It will require a strong case to sustain a reversal

¹ *R. v. Holmes*, 2 F. & F. 788.

² *R. v. Brazier*, 1 Leach, 199; *S. C.* 1 East P. C. 443; *Com. v. Hutchinson*, 10 Mass. 225; *State v. Morea*, 2 Ala. 275; and see, to same effect, observations of Alderson, B., in *R. v. Perkin*, 2 Moo. C. C. 139; Anonymous, 2 Pen. (N. J.) 930; *Washburn v. People*, 10 Mich. 372; *State v. Le Blanc*, Mill (S. C.), 354; *S. C.* 3 Brev. 339.

³ *R. v. Powell*, 1 Leach, 110; *R. v. Brazier*, 1 Leach, 199; *R. v. Williams*, 7 C. & P. 320; *R. v. Travers*, 2 Str. 700; *State v. Whittier*, 21 Me. 341; *State v. De Wolf*, 8 Conn. 98; *Com. v. Hutchinson*, 10 Mass. 225; *Com. v. Hill*, 14 Mass. 207; *Jackson v. Gridley*, 18 Johns. 98; *People v. McGee*, 1 Denio, 19; *Com. v. Carey*, 2 Brewst. 404; *Draper v. Draper*, 68 Ill. 17; *Blackwell v. State*, 11 Ind.

196; *State v. Morea*, 2 Ala. 275; *Wade v. State*, 50 Ala. 164; *State v. Denis*, 19 L. An. 119; *State v. Scanlan*, 58 Mo. 204; *Vincent v. State*, 3 Heisk. 120; *Logston v. State*, 3 Heisk. 414; *Flanagan v. State*, 25 Ark. 92; *Warner v. State*, 25 Ark. 447; *Davidson v. State*, 39 Tex. 129. See, as to the Ohio limit of ten years, Act of February 14, 1859, § 1. As to same limit in Missouri, see *State v. Scanlan*, 58 Mo. 204.

⁴ Per Patteson, J., *R. v. Williams*, 7 C. & P. 320.

⁵ 1 Leach, 430, n.; *R. v. Nicholas*, 2 C. & K. 246; *Powell's Evidence*, 4th ed. 29.

⁶ *R. v. Perkins*, 2 Mood. C. C. 135; *State v. Whittier*, 21 Me. 341; *Com. v. Hutchinson*, 10 Mass. 225; *Com. v. Mullins*, 2 Allen, 295; *Com. v. Lattin*, 29 Conn. 389; *Den v. Vancleve*, 2

of the ruling of the court examining such a witness.¹ When a child is incompetent simply for want of instruction as to the nature of an oath, the practice has been to postpone the case so that the child might be intermediately properly instructed.² When, however, "the infirmity," to use the language of Pollock, C. B., "arises from no neglect, but from the child being too young to have been taught, I doubt whether the loss in point of memory would not more than counteract the gain in point of religious instruction."³ A temporary suspension, however, to enable a child to recover from agitation, is not merely unobjectionable but proper.⁴ The preliminary examination of the witness must be public, not private.⁵

§ 401. Deficiency in perception, to operate as an exclusion, must go to the capacity to perceive the phenomena in dispute. A blind man, however, may be called to identify another person, the senses of hearing and of touch being often made more acute by the loss of sight ;

Deficiency in percipient powers if total excludes.

South. (N. J.) 589; *Simson v. State*, 31 Ind. 90; *Com. v. Le Blanc*, 3 Brevard, 339; *Peterson v. State*, 47 Ga. 524.

¹ Anonymous, 2 Pen. (N. J.) 930; *Peterson v. State*, 47 Ga. 524.

² See note to *R. v. White*, 1 Leach, 430.

³ *R. v. Nicholas*, 2 C. & K. 246. See remarks as to credibility of infants in Whart. Cr. Law, 7th ed. § 756.

⁴ "The course pursued on the occasion was eminently proper. There is a practice sanctioned by time-honored precedent, under which, when a child is found too young to testify with a proper sense of responsibility, the trial may be postponed until the witness shall have been suitably instructed. This, however, has been criticised, as like 'preparing or getting up a witness for a particular purpose.' In the present case, even that objection disappears. While the child was so laboring under nervous agitation from the novelty of the surroundings, as to give unintelligible or absurd answers,

she was not permitted to testify. The court merely waited for a natural recovery of mental equilibrium, which should permit the true capabilities of the witness to appear. No sign was visible then in her examination, that she was incapable, either of receiving just impressions of the facts about which she was to testify, or of relating them truly. We can find no error in the record." *State v. Seanlan*, 58 Mo. 206, Lewis, J.

⁵ In a trial for rape in Indiana, the prosecuting witness was a child only six years old at the time of the trial, which was sixteen months after the alleged offence. The witness being excepted to, she was examined by the court, who, not being satisfied, appointed two gentlemen, who retired with the child to a private room, and after some time reported to the court that "in their opinion her testimony ought to be heard, but received with great allowance." It was held that this reference was irregular, and that the court ought to have acted on its

and even if this were not so, identification of voice and accent is always an incident entitled to weight. Loss of the applicatory sense, *after* the period of observation, does not affect the admissibility of testimony. Hence, a blind man is competent to testify to what he saw prior to his blindness; a deaf man to what he heard prior to his deafness.¹ But generally a person incapable of perception is incapable of testifying. If the incapacity of perception is total, — *e. g.* idiocy, — then the incapacity for giving evidence is total.² Where, however, the incapacity of perception is partial, the incapacity to testify cannot be extended beyond the limits of such incapacity to perceive. Thus a blind man can testify as to what he has heard, and a deaf man as to what he has seen.³ Whether a person drunk, or asleep, or etherized at the time of the event, is competent, has been elsewhere discussed.⁴ Stupor, no matter from what cause, may be always shown to affect credibility.⁵

§ 402. In respect to persons of deranged intellects interesting questions arise in this relation. Formerly it was held that lunatics, as they were called, were to be universally excluded from the witness box. This sweeping rule, however, has receded before the conviction that as there can be neither perfect sanity nor perfect insanity, so no witness is to be absolutely excluded because he is insane.⁶

own judgment, at a public examination in the defendant's presence. *Simson v. State*, 31 Ind. 90; *State v. Morea*, 2 Ala. 275.

¹ Weiske, *Rechtslexicon*, XV. 253; *Schneider*, *Lehre der Beweis*, § 112. *Infra*, § 405.

² *Coleman v. Com.* 25 Grat. 865.

³ *Harrod v. Harrod*, 1 Kay & J. 9; *Morris v. Lennard*, 3 C. & P. 127; *R. v. Powell*, 1 Leach, 110; *R. v. Travers*, 2 Str. 700; *R. v. Boston*, 1 Leach, 408; *R. v. Wade*, 1 Mood. C. C. 86; *Com. v. Hill*, 14 Mass. 207; *State v. De Wolf*, 8 Conn. 93.

⁴ 1 Whart. & St. Med. Jur. §§ 245, 789; Whart. Cr. Law, 7th ed. § 753. In *Beale's case* (2 Whart. & St. Med. Jur. § 266), and *Green's case* (*Ibid.* § 267), convictions were sustained on

the testimony of women as to what took place when they were etherized. But these convictions are open to grave criticism. *Ibid.*

⁵ *Hartford v. Palmer*, 16 Johns. 143; *Sisson v. Conger*, 1 Thomp. & C. 564; *Tuttle v. Russell*, 2 Day, 201; *Fleming v. State*, 5 Humph. 564.

⁶ 1 Whart. & St. Med. Jur. § 342; 2 *Heard's Lead. Cas.* 20; *R. v. Hill*, 5 Cox, C. C. 259; *S. C.* 2 Den. C. C. 254; 5 Eng. L. & E. 547; *Fennell v. Tait*, 1 C., M. & R. 584; *Spitte v. Walton*, L. R. 11 Eq. 420; *Com. v. Reynolds*, cited 10 Allen, 64; *Kendall v. May*, 10 Allen, 59; *Holecomb v. Holecomb*, 28 Conn. 177; *Livingston v. Kiersted*, 10 Johns. 362; *Coleman v. Com.* 25 Grat. 865; *Campbell v. State*, 23 Ala. 44.

§ 403. If the witness appears, on examination by the judge, or by evidence *aliunde*, to have been incapable, at the time of the occurrences which he is called to relate, of perceiving, or to be incapable, at the time of the trial,

Witness
may be
examined
by judge.

As to witness imbecile from old age, see *McCutcheon v. Pigue*, 4 Heisk. 563.

As to intoxicated witnesses, see *infra*, § 418.

In *R. v. Hill*, *supra*, a lunatic patient, who had been in confinement in a lunatic asylum, and who labored under the delusion, both at the time of the transaction and of the trial, that he was possessed by 20,000 spirits, but whom the medical witness believed to be capable of giving an account of any transaction that happened before his eyes, and who appeared to understand the obligation of an oath, and to believe in future rewards and punishments, was called as a witness on a trial for manslaughter; it was held that his testimony was properly received in evidence; and that where a person under an insane delusion is called as a witness, it is for the judge, at the time, to say whether he is competent to be a witness, and it is for the jury to judge of the credit that is to be given to his testimony. If upon his examination upon the *voir dire*, he exhibits a knowledge of the religious nature of an oath, it is a ground of his admission. If the judge has admitted a witness to give evidence, but upon proof of subsequent facts affecting the capacity of the witness, and of observations of his subsequent demeanor, the judge changes his opinion as to his competency, the judge may stop the examination of the witness, strike his evidence out of the notes, and direct the jury to consider the case exclusively with reference to the evidence of the other wit-

nesses. *R. v. Whitehead*, 1 L. R. C. C. 33; 35 L. J. M. C. 186; 14 W. R. 677.

Dr. Ordronaux, commissioner in the case of *State v. N. Y. Hospital*, where the question was the credibility of the testimony of an insane witness, comments as follows on the topic in the text:—

“ Courts have always looked with distrust upon the testimony of the insane, because of its generally misleading character. Nor will this appear surprising when we recall the disturbing influences, produced by insanity, upon the moral as well as the mental faculties. From the earliest of our decisions, touching the competency of such evidence (*Livingston v. Kiersted*, 10 Johns. 362, A. D. 1813; *Hartford v. Palmer*, 16 *ibid.* 143, A. D. 1819), down to the present day, this form of proof has never been considered *primâ facie* wherever any other relating to the same series of facts could be obtained. The reasons for this are aptly set forth in the case of *Holcomb v. Holcomb*, 28 Conn. 181, A. D. 1859, where the court, commenting upon the value of such testimony, said:—

“ The inlets to the understanding may be perfect, so far as any human eye can discern; the moral qualities may all be healthy and active; the conscience may be sensitive and vigilant, and the memory may be able to perform its office faithfully, and yet, under the influence of morbid delusions, reason becomes dethroned, false impressions from surrounding objects are received, and the mind becomes an unsafe depository of facts. . . .

“ The force of all human testimony

of relating, then he is to be ruled out.¹ But to justify such depends as much upon the ability of the witness to observe the facts correctly, as upon his disposition to describe them honestly; and if the mind of the witness is in such a condition that it cannot accurately observe passing events, and if erroneous impressions are thereby made upon the tablet of the memory, his story will make but a feeble impression upon the hearer, though it be told with the greatest apparent sincerity.’ ”

After noticing Hill’s case, above cited, Dr. Ordronaux proceeds :—

“Except in the case above cited, I cannot find a single instance where a lunatic, not in a lucid interval, was admitted to testify before a court. In the only instance which approximates to it, namely, in 3 Dowl. Pr. Cas. 161, a party applied for a *habeas corpus* to bring up a person who was confined in a lunatic asylum, for the purpose of producing him as a witness. The affidavit stated that he was *rational*. The court held that the writ could be granted if the party was in a fit state to be removed, and was not a dangerous lunatic. Both these cases, however, go to the extent, only, of showing that where no better testimony than that of a lunatic exists, it is competent to offer him as a witness, leaving the court to decide upon his admissibility. But the common law doctrine remains, nevertheless, unchanged, wherever it can be applied without hindrance to justice.

“The reasons for this exclusion are well stated by Mr. Shelford, who, in his *Law of Lunatics and Idiots*, p. 621, says, in confirmation of this doctrine, that ‘the ground of excluding the evi-

dence of insane persons, in courts of justice, requires little or no illustration, for it is obvious that they are altogether unfit to communicate such information as can be relied upon, or will afford a motive to assent in any case, and much caution is required in admitting persons who are sometimes insane to give testimony in a court of justice, even during their lucid intervals. When, indeed, the intermission of the disease has been long, and the facts concerning which the evidence is required are of recent occurrence, and no access of the disease has followed, evidence of the facts to which such a witness deposes ought to be received, more especially if other witnesses to the same point cannot be obtained; but such evidence is liable to great suspicion, and will not, perhaps, be entitled to receive full credit, except in conjunction with, and as corroborative of other proof.’

“It is upon these two last mentioned principles, namely, that no other witnesses to the same point could be obtained, and second, that it was corroborative of other proof, that the insane witness, Donnelly, was allowed to testify in *Regina v. Hill*, and it is because of these same existing conditions in *Mrs. Norton’s* case that I have felt it proper to admit her testimony. Nevertheless, since a period of insanity has always been considered at law as one of civil death, from which no *primâ facie* testimony could be elicited, great doubt must necessarily attach itself to the evidence of persons who, having nominally recovered from a state of insanity, seek to testify to facts occurring during its existence.”

¹ *R. v. Hill*, 5 Cox C. C. 259; *S. C.* 2 Den. C. C. 254; *Powell’s Ev.* 4th ed. 28; *Holcomb v. Holcomb*, 28

Conn. 177; *Coleman v. Com.* 25 Grat. 865; *Livingston v. Kiersted*, 10 Johns. R. 362. *Supra*, § 391.

clusion mere streaks of insanity are not sufficient. A man may have many delusions and yet be capable of narrating facts truly; and in any view, the existence of such delusions on his part, at the time of trial, goes to his credit and not to his competency.¹ Evidence, also, of mental disturbance, at the time of the events narrated, can be received to affect credibility.² But the judge, on being convinced of the incompetency of the witness, at the trial, may at any period stop the examination, and direct the jury to disregard the witness's testimony.³ This question, as we have seen, arises when witnesses testify as to what happened to them when unconscious, or when they are more or less intoxicated at the trial.⁴

. . . . "For no presumptions of absolute recovery from a state of acknowledged insanity arise in law from the lapse of time alone. Something more than this is needed, and the burden of proof is on him who alleges it. *Attorney Gen. v. Parnter*, 3 Bro. Ch. Ca. 443; *Peaslee v. Robbins*, 3 Mete. 164; *Hix v. Whittemore*, 4 Met. 545; *Shelford on Lunatics*, 275; 1 *Greenleaf on Evidence*, § 42.

"It has been, therefore, the invariable practice of courts to make this inquiry as a condition precedent to the admissibility of the witness. It was so done in *Regina v. Hill*, above cited; it was reaffirmed in *Spittle v. Walton*, 40 L. J. Chancery, 368; and again in one of our own courts, in *Campbell v. The State*, 23 *Alab.* 41, where Chief Justice Chilton, speaking to the point, said, that 'the question was, whether the witness, conceding him to have labored under mental delusion at a previous period, was, at the time of the trial, of sound mind.' In *Mrs. Norton's* case, it seemed to me the more equitable way to allow her to testify in her own behalf, without previous examination, leaving that testimony to stand or to fall, as a test of her mental competency, according as it squared with itself, and was corrobor-

rative of facts otherwise circumstantially established." Pamphlet Report, N. Y. 1876.

¹ *R. v. Hill*, 2 Den. C. C. 254; *S. C.* 5 Cox C. C. 259; *R. v. Whitehead*, L. R. 1 C. C. R. 33; *Spittle v. Walton*, L. R. 11 Eq. 420.

² *Fairchild v. Bascomb*, 35 Vt. 398; *Holcomb v. Holcomb*, 28 Conn. 177; *Rivara v. Ghio*, 3 E. D. Smith, 264. See *Bell v. Rimmer*, 16 Oh. St. 45. In Vermont the right to examine on *voir dire* is disputed. *Robinson v. Dana*, 16 Vt. 474.

³ *R. v. Whitehead*, L. R. 1 C. C. 33.

⁴ See 2 Whart. & St. Med. Jur. §§ 245-266. *Infra*, 407.

A maniac as said by commentators on the Roman law, is an incompetent witness as to the transaction to which his mania extends; but this cannot be sustained, for the determination of incapacity can only be completed by the examination of the witness, and his supposed mental derangement goes to the value, not the competency, of his testimony. The passage relied on from the Institutes is, "Furiosus nullum negotium gerere potest, quia non intellegit quid agit." § 8, L. iii. 18. But this is not only confined to matters of business, but assumes uncon-

An inquisition of lunacy may be *primâ facie* evidence of incompetency,¹ but does not exclude if upon hearing the court find that the witness understands the nature of an oath, and the facts of which he speaks.²

consciousness on the part of the "furiosus" of what he is doing.

¹ *Hoyt v. Adey*, 3 Lansing, 173.

² The point in the text is well discussed in the following opinion: "The first question that arises in the case was originally made at the hearing before the auditor. The plaintiff offered himself as a witness to prove his account. The defendant's counsel objected that he was not a competent witness under the provisions of Gen. Sts. c. 131, § 14, because the defendant was insane. The auditor overruled the objection, because upon due hearing he found as a fact that the mental condition of the defendant was not such as would incapacitate him from being a witness. The defendant's counsel contends that this ruling was erroneous; that the appointment of a guardian by the probate court, and the leave granted by the superior court to the guardian to appear and defend this action, were conclusive evidence of the insanity of the defendant, and that his mere insanity excludes the plaintiff from testifying.

"There can be no doubt that where one party is insane to such a degree as to exclude him from being a witness, the statute does not intend to admit the other party. But it is not every degree of insanity that has this effect.

"This question was thoroughly considered in *Regina v. Hill*, 15 Jurist, 471, the same case being also reported in several other books. On the trial of an indictment for manslaughter, Coleridge, J., admitted a witness to testify who was brought into court

from a lunatic hospital, and who labored under the delusion that he was possessed of twenty thousand spirits. In the court of criminal appeal this ruling was affirmed by Lord Campbell, C. J., Platt, Talfourd, and Coleridge, JJ. The rule as they state it is, that it is for the judge to satisfy himself whether the witness understands the nature of the oath, and is capable of testifying. He then decides upon the competency of the witness, and if he admits him, it is left to the jury to estimate the value of his testimony.

"This is the only rational and just rule that can be adopted. Insanity exists in various degrees. Modern investigations have shown that it exists much more extensively than was formerly supposed, and that persons who are affected to such an extent that it is expedient to place them in insane hospitals or under guardianship often possess sufficient knowledge of the nature of an oath and of events that took place in their presence to make them useful and trustworthy as witnesses. A rigid rule that would exclude the testimony of all such persons as untrustworthy witnesses would not be conformable to facts, and therefore would not be founded in good sense. Nor would such a rule promote justice. It would leave insane persons needlessly unprotected in hospitals and elsewhere, and would deprive the public and individuals of their testimony in cases where it might be important and valuable.

"In commenting upon such a rule, Talfourd, J., remarked that Luther supposed he had conferences with the

§ 404. "The credibility of a witness to a fact seems to depend mainly on the four following conditions: namely, 1. That the fact fell within the range of his senses. 2. That he observed or attended to it.¹ 3. That he possesses a fair amount of intelligence and memory.² 4. That he is free from any sinister or misleading interest: or if not, that he is a person of veracity. If a person was present at any event, so as to see or hear it; if he availed himself of his opportunity, so as to take note of what passed;³ if he has sufficient mental capacity to give an accurate report of the occurrence; and if he is not influenced by personal favor, or dislike, or fear, or the hope of gain, to misreport the fact;⁴ or if, notwithstanding such influence, his own conscience and moral or religious principle, or the fear of public opinion, deters him from mendacity, such a person is a credible witness."⁵ Of the dependence of credibility on the opportunities possessed by the witness for observation, we may draw an illustration from the line of cases which involve collisions at sea. It has been remarked that collision cases are peculiarly distinguished for conflict of testimony; and this may be partially explained by the prejudice felt by witnesses for their own boats. In boat races a conflict takes place as to every question as to which a conflict can be raised; and the gravest as well as the lightest yield to the common excitement. The late Mr. John Sergeant once illus-

Credibility depends not only on veracity but on capacity to observe.

devil, and Dr. Johnson entertained delusions respecting his mother. In the case of *Commonwealth v. Reynolds*, which was an indictment for murder tried in Bristol in 1863, this court admitted an insane person to testify, adopting the principle laid down in *Regina v. Hill*. In *Leonard v. Leonard*, 14 Pick. 280, it is said that an insane person under guardianship may make a will, if of sufficient capacity. The reason of allowing him to testify, if he understands the nature of an oath and the facts which he relates, is at least as strong as for allowing him to make a will. The auditor, therefore, decided correctly the question of law in respect to the com-

petency of an insane person to testify." *Chapman, J., Kendall v. May*, 10 Allen, 63.

¹ See *People v. Bodine*, 1 Edm. Sel. Cas. 36; *Julke v. Adam*, 1 Redf. (N. Y.) 454.

² See *Willet v. Fister*, 18 Wall. 91; *Evans v. Lipsecomb*, 31 Ga. 71.

³ See *Barrett v. Williamson*, 4 McLean, 589; *Jacksonville R. R. v. Caldwell*, 21 Ill. 75; *Durham v. Holeman*, 30 Ga. 619; *Hitt v. Rush*, 22 Ala. 563.

⁴ See *Chicago R. R. v. Triplett*, 38 Ill. 482.

⁵ Sir Geo. Corn. Lewis, on Influence of Authority, 2d ed. 1875, p. 15.

trated this by relating a collision case that was tried when he was a young man, the two colliding ships being filled with lawyers who were going from Philadelphia to Wilmington to attend court. Which was the aggressor, was the question to be tried in the collision case; and on this question each lawyer swore with his ship. But it is not only by prejudice or passion that such conflicts can be explained. The most dispassionate and the most accurate of observers, so we are told, when on one moving vessel, fail in taking a correct view of the absolute course of another vessel. We cannot overcome the instinctive belief that it is our own vessel that is stationary, and that it is the other alone that moves. Hence admiralty courts have held that the testimony of mere observers on board a vessel, is to yield, in cases involving the course and deflection of the vessel to that of those who hold her helm in their hands.¹ What is true of the sea, is true, though in varying degrees, of the land. We all occupy stand-points which make us, however honest, more or less incapable of perfectly accurate observation. Until allowance be made for this incapacity, no testimony can be properly weighed.²

§ 405. A witness may have been capable of perceiving yet be incapable of relation. He may have no powers of speech, and have no means of expressing himself by signs. He may have become insane since the occurrences he is called upon to relate. If, however, such incapacity is temporary, the court will in proper cases direct an adjournment so that it may be overcome.³ But the application must be made before the jury is sworn.⁴ And the case must be one which promises a speedy restoration.⁵

§ 406. Deaf and dumb persons were formerly regarded as idiots, and therefore incompetent to testify; but the modern doctrine is that if they are of sufficient understanding, and know the nature of an oath, they may

¹ McNally v. Meyer, 5 Ben. 239.

² R. v. White, 1 Leach, 430, n. a.

³ On this point observe the comments on Lady Tichborne's declarations, *supra*, § 9. The same criticism applies to Lady Vane's declarations in the Vane case, before Malins, V. C., December, 1876.

Supra, §§ 400, 401.

⁴ R. v. Wade, 1 Moody C. C. 86; R. v. Kinloch, 18 How. State Trials, 402.

⁵ *Supra*, § 400.

give evidence either by signs, or through an interpreter, or in writing.¹ It has been laid down that “the presumption is always in favor of sanity, and there is no exception to this rule in the case of a deaf and dumb person, but the *onus* of proving the unsoundness of mind of such a person must rest upon those who dispute the sanity.”²

§ 407. If there are any means by which the witness may be interpreted, such means will be adopted. A deaf mute, for instance, may be permitted to express himself in writing, if this be the mode in which he can be better understood, or through a sworn interpreter by whom his signs can be interpreted.³ Such interpretation is not hearsay,⁴ nor is it excluded by the fact that the witness can write.⁵

Interpretation of witness permissible.

§ 408. One of the advantages of cross-examination, as we shall have occasion to see more fully hereafter,⁶ is that it enables the bias of a witness to be disclosed, and this is peculiarly important when interest is no longer a ground for disqualification. We should at the same time remember, however, that pecuniary interest in a case is by no means the only influence by which bias is produced. Relationship, party sympathy, personal affection, work upon the perceptive powers of witnesses more subtly and more effectively, in the great body of cases, than does pecuniary interest; and it is by no means creditable to the English common law, that it regarded the less honorable influence as so powerful that the interest of a single penny would incapacitate, while it so little appreciated the force of the nobler affections that in only one case, that of marital relationship, did it recognize their existence.⁷ Now, however, that all disqualifications are removed, and that proof of interest goes only to credibility, influences of all kinds are equally objects of consideration, in determining how far

Bias to be taken in account in estimating accuracy of witness.

¹ 1 Hale P. C. 34; *Rushton's case*, 1 Leach C. C. 408; *Morrison v. Lennard*, 3 Car. & P. 127. See *supra*, § 401.

² Per Lord Hatherly, *Harrod v. Harrod*, 4 K. & J. 9; *Powell's Evidence*, 4th ed. 28, and cases in next section.

³ *R. v. Huston*, 1 Leach, 408; *R.*

v. Steel, 1 Leach, 452; *Morrison v. Lennard*, 3 C. & P. 127; *Com. v. Hill*, 14 Mass. 207; *State v. De Wolf*, 8 Conn. 93; *Snyder v. Nations*, 5 Blackf. 295.

⁴ *Supra*, § 174.

⁵ *State v. De Wolf*, 8 Conn. 93.

⁶ *Infra*, § 527.

⁷ See *infra*, § 419.

credibility exists. Credibility, therefore, so far as it depends upon the capacity for accurate narration, is now relieved from the obstructions produced by the old rules, and is determinable by the ordinary laws of free logical criticism.¹ The ques-

¹ See *Watkins v. Causall*, 1 E. D. Smith, 65; *Chicago R. R. v. Triplett*, 38 Ill. 482; *Sullivan v. Collins*, 18 Iowa, 228.

"The trustworthiness (*fides*) of testimony is settled by the general logical rules which govern the inference from the conditioned to the condition, and, more particularly, the construction and verification of hypotheses, for this is only a special case of that more general class. The fact to be concluded is the real prius of the testimony. The content of the testimony may have for its ground, either that the event has happened and has been observed exactly in the same way, or that the observation has been influenced by a false apprehension, an untrue recollection, preference of some fancy to strict accuracy, or the confusion of subjective judgment with objective fact. But the witness of an immediate or eyewitness (*testis primitivus, proximus, oculatus*), who is an immediate witness notoriously or according to the assured concurrence of historical criticism, is trustworthy, provided that he has been able to apprehend the fact strictly and truly, according to his intellectual and moral condition, and to represent it truly, and has taken care to do so. The agreement of several immediate witnesses with each other gives to their assertion a very high probability, if it is proved that they are independent, that they have not been deceived by the same deception, nor have been affected and psychologically influenced by the same one-sidedness in apprehension and statement; for a purely accidental agreement in an accidental

circumstance has, according to the laws of the calculation of probability, a very high degree of probability in all complicated relations. The trustworthiness of mediate witnesses (*testes secundarii, ex aliis testibus pendentes*) is determined partly by their sense and critical capacity, partly and chiefly by their relation to immediate witnesses. It is an essential problem, but seldom absolutely soluble, to discover the genealogy of testimony. The testimony of later witnesses is suspicious, especially when there is anything in it to serve a distinct (poetical, national, philosophical, dogmatic, or practical) tendency, and the further it stands from the actual occurrences. The verification of the subjective trustworthiness of different witnesses is reciprocally related to the verification of the objective probability, which what is attested has in itself and in connection with undoubted facts. Criticism is positive so far as it has to construct a complete picture of the real previous occurrence by combining the true elements and excluding the false." Ueberweg's *Logic*, Lindsay's trans. § 140.

"The teacher, physician, historian, and judge, have daily occasion to observe how little men are accustomed to describe the simple facts, and how very much they mix up in the statement (unconsciously and unintentionally) their own opinions and interests. It is inconceivably hard, I had almost said impossible, to describe what has been seen or heard wholly and exactly as it has been seen and heard. We often introduce our own feelings without anticipating it, and although we

tion now is, not whether a witness is to be received, but how far he is to be believed.¹ Interest and party sympathy may be always shown in order to discredit a witness,² and the same observation may be made as to near relationship.³ But immorality cannot be introduced to affect credibility unless it be involved in a reputation for untruth.⁴

§ 409. A witness spending a single day in a country, may be examined as to its climate, but his answer will relate to what may be only exceptional phenomena ; and his testimony will at the best be entitled to but little weight compared with that of an observer for years. A physician called upon once to visit a patient can speak as to this interview, but cannot speak as to what he had no opportunities to observe.⁵ Farmers will be entitled to credit in agricultural matters, as to which other persons are of no authority ;⁶ and so, *mutatis mutandis*, as to architects.⁷ Opportunities of observation, though not essential to competency, are of much importance, therefore, in determining credibility, for a witness is entitled to little credit when he narrates that which he did not witness.⁸ In questions of identity this caution is to be peculiarly observed.⁹

And so of want of opportunities of observation.

have the strongest and purest love of truth. We see in the descriptions not the things themselves, but only the impressions which they have made upon the soul of our author, and we know that the account of the impression never fully corresponds to the things. It is the business of the historical critic to infer back from the narrative to the first form of the impression, and from this to the actual fact, to remove the additions and changes due to subjective influence, and to restore the objective occurrence." Ibid.

¹ See *infra*, § 566.

² *Infra*, §§ 544, 545.

³ *Infra*, § 566; *Gangwere's Est.* 14 Penn. St. 417; *Tardif v. Baudoin*, 9 La. An. 127.

⁴ *Infra*, § 563; *State v. Randolph*, 24 Conn. 363; *Smithwick v. Evans*, 24 Ga. 461.

⁵ See *Barrett v. Williamson*, 4 MeLean, 589; *Durham v. Holeman*, 30 Ga. 619; *Hitt v. Rush*, 22 Ala. 563.

⁶ *Jacksonville R. R. v. Caldwell*, 21 Ill. 75.

⁷ *Tucker v. Williams*, 2 Hilt. (N. Y.) 562. See *infra*, § 439.

⁸ See fully on this point, §§ 71, 72.

⁹ "Now, the question being one of identity, a good deal has been said about the doubtful nature of the inquiry, and of the only proof which, generally speaking, can be produced of identity; and I quite agree that it is one of the most difficult questions with which courts of justice and juries have to deal, and that it is one of those questions upon which they are occasionally liable to go wrong. But ordinary cases of identity are very different indeed from the present. Frequently a man is sworn to who has

§ 410. Nor should the capriciousness of memory be left out of account in adjusting credibility. Old persons recollect the impressions, of their childhood far more vividly than they do those of their maturer years. Falstaff,

And so as
to uncertainty
of memory.

been seen only for a moment, or for a very short space of time. A man stops you on the road, puts a pistol to your head, and robs you of your watch or your purse; a man seizes you by the throat, and while you are half strangled, his confederate rifles your pockets; a burglar invades your house by night, and you have only a rapid glance to enable you to know his features. In all these cases the opportunity of observing is so brief that mistake is possible, and yet the lives and safety of people would not be secure unless we acted on the recollection of features so acquired and so retained; and it is done every day. There are instances, indeed, in which the supposed recollection of the features of a person accused has proved faulty. I have known such instances myself. I remember to have been present years ago at a trial, which I never shall forget, on the western circuit, in which two men were tried for murder. They were both convicted, one upon evidence of identity given by numerous persons, who all swore to the man. He was convicted, and if execution had followed upon conviction with the rapidity it did at an earlier time, the man would have been executed. It was proved afterwards, beyond all possibility of a doubt, that those who had sworn to the identity of the man were mistaken. He had been taken up for picking pockets on the day the murder was committed, hundreds of miles away from the place; he was in confinement at the time under the latter charge; there was not the slightest doubt in the world about it. The man was, of course, reprieved.

I tried a case not very long ago at Hartford, where a man was charged with night poaching, and with a most serious assault upon a keeper, — the keeper having been most cruelly used. The keeper was a most respectable man, head-keeper of a nobleman in the country. Nobody doubted his perfect veracity and intention to speak the truth, and he swore most positively to the man. I had not the slightest doubt of his testimony. The jury convicted the prisoner. It turned out afterwards that we were all mistaken. It was shown satisfactorily that he had been mistaken for another man. Therefore I quite agree with what was said by the learned counsel for the defendant, that in ordinary cases identity is a very difficult point; and here it is the question at issue in this case. But in the cases I am speaking of, you have merely the evidence of persons who have had a short and casual opportunity of becoming acquainted with the appearance of the individual. Here we have a much wider range of proof; but at the same time the inquiry is one which has its own peculiar difficulties; for whereas in the cases to which I have been referring the recollection is called forth in a court of justice speedily after the event, here we are dealing with the identity of a man alleged to have been dead ever since 1854, — twenty years ago, — and the asserted identity of another man who for a great number of years has disappeared from the knowledge of all those who knew the undoubted man, from the year 1854, at all events, until the year 1866 or 1867. And if in ordinary cases evidence of

on his death-bed, "babbled of green fields," though since boyhood his life had been spent in the city. Chief Justice Marshall, when dying, — to pass from one of the weakest to one of the strongest of characters, — repeated a child's hymn, recalling the scenes of his infancy, —

Coelumque

Adspicit, et dulces moriens reminiscitur Argos.

This experience is almost universal; yet we must remember that the tenacity of such impressions is more remarkable than their accuracy.¹ The reason why the memory is so retentive of early events is, that when these events occurred the memory was plastic; but the fact that the memory is plastic by no means presupposes its exactness. Its very plasticity makes it open to disturbing contemporaneous influences, just as the least palpitation in the air will disturb the features of a cast when in the first processes of hardening. The influence of association, also, has a great deal to do with even our riper memory. We

identity is calculated to mislead us or embarrass us, how much more must it do so in a case like the present, where you have a host of witnesses on the one side confronted with an equal host on the other; where, with the exception of the mother, you have an entire family, — I say an entire family, for I attach no value to the opinion of Mr. Biddulph, — a body of persons who were as familiar with Roger Tichborne, whose existence is in dispute, as it is possible for people to be, and who deny the identity of the defendant; and, on the other hand, the mother of the undoubted Roger Tichborne asserting that he is her son; a host of witnesses coming forward to say that he is not the man, and equal, or perhaps a greater number coming forward to say that he is, while the matter is still further complicated by this extraordinary circumstance, that while the defendant says, 'I am Roger Tichborne,' and produces numerous witnesses to say that he is, and another

vast array of witnesses come forward to say he is not, the identity of the man, who thus claims to be Roger Tichborne, with a totally different individual, namely, Arthur Orton, is in like manner asserted and contested. So that the defendant stands, as it were, between two persons, between Arthur Orton on the one hand, and Roger Tichborne on the other; and while he asserts he is Roger Tichborne, a host of witnesses declare that he is Arthur Orton; so that the same conflict which occurs with reference to his identity with Roger Tichborne occurs with reference to his identity with Arthur Orton; and you have witness after witness produced to say he is Arthur Orton, and witness after witness to say he is not." Cockburn, C. J., charge in Tichborne case, p. 12.

¹ See observations as to comparative accuracy in this respect, *supra*, §§ 9, 11, 72.

are accustomed to see a particular person in a particular place ; we do not readily recognize him when we see him out of that place ; when we visit the place we are apt to imagine we see him in his familiar nook. Great allowance, also, is to be made for the idiosyncrasies of memories. A great master of legal logic thus speaks : “ There are things which pass every day, which make no impression on the mind of one man, but which do make an impression on the mind of another. Men dine at the same mess or table, something occurs in the course of the conversation ; one man remembers it, the other does not think of it any more, and the next morning it is forgotten. One man recollects some event in his past life, more or less important, or more or less trivial, which some one else present at the same time, if you were to ask him about it, would have no knowledge of or recollection of at all. Of all the unfathomable mysteries which the human mind presents, there is none in my view so astonishing as the faculty of memory, especially in the matter to which I am now adverting ; that is how some things comparatively trivial remain indelibly impressed on the recollection, while others, far more important, fade away into the darkness of eternal night and are totally and entirely forgotten. It would not be fair, therefore, to say, “ Here are half a dozen people who were present with you on a certain occasion, and they all recollect a certain fact. If you do not remember it you cannot be the man.” Still less just would it be if each of those individuals were allowed to pick out some peculiar circumstance which has remained impressed on his individual memory, and then, because the man did not recollect all that the six persons recollected, it should be said, “ Oh, you cannot be the man.” I quite agree, we must not deal with a man in that way ; it would be unfair and unjust to do so ; but there are things which it is next to impossible any one should forget, and in respect of those things we are entitled to require that a man should exhibit some knowledge, when you know that they happened to a person whom he represents himself to be. Yet even here we must be on our guard ; for even things of importance, things that you would have expected to remain impressed on a man’s memory, often pass away and are forgotten ; but if you find that a multitude of circumstances such as you cannot rea-

sonably believe that a man could have forgotten are unknown, a very different case presents itself.”¹ But no matter how uncertain a witness’s memory may be, or may be admitted to be by himself, this, it must be mentioned in addition, goes to his credibility, not his competency.²

§ 411. Fabricators deal usually with generalities, avoiding circumstantial references which may be likely to bring their statements into collision with other evidence. A careful avoidance of details, when persisted in during cross-examination, was one of the causes of the breaking down of the witnesses against Queen Caroline; and such avoidance is always suspicious.³ The conclusion, however, is not one of technical jurisprudence, but of psychology. Events of remote date we cannot expect a witness to remember in detail; and some portion, at least, of such circumstances we must be prepared to find lost in haze. If involving matters of deep interest to the witness they may be remembered in their effects, but not ordinarily in their particulars. A minute specification of details, as to very distant events, in which the witness had no personal interest, does not enhance credit;⁴ its absence, as to such events, does not detract from credit.⁵ But as to matters which the witness, under ordinary circumstances, would remember, the test fairly applies.

§ 412. *Falsum in uno, falsum in omnibus*, is a maxim which is proper in cases in which the special falsity is of a nature to imply falsity as to the whole case;⁶ or when the contradictions are so numerous as to show imbecil-

Want of circumstantiality a ground for discredit.

Falsum in uno does not absolutely discredit.

¹ Cockburn, C. J., charge in Tichborne case.

² Lewis v. Ins. Co. 10 Gray, 508; Kuntzman v. Weaver, 20 Penn. St. 422.

³ See supra, § 8 *et seq.*; Spicott’s case, 5 Rep. 58; Presbytery of Auchterarder v. Kinnoul, 6 Cl. & F. 698; Walker v. Blassingame, 17 Ala. 810; Cornet v. Bertelsmann, 61 Mo. 118. “*Dolus versatur in generalibus*, — a person intending to deceive deals in general terms, — which has been adopted from the civil law, and is

frequently cited and applied in our courts.” Broom’s Legal Max. 289.

⁴ Willet v. Fister, 18 Wall. 91; Parker v. Chambers, 24 Ga. 518; Chandler v. Hough, 7 La. An. 411.

⁵ Fulton v. Macracken, 18 Md. 538; State v. Cowan, 7 Ired. L. 239; Black v. Black, 38 Ala. 111. *Infra*, §§ 413, 514.

⁶ Hargraves v. Miller, 16 Oh. 338; Stoffer v. State, 15 Oh. St. 47; Richardson v. Roberts, 23 Ga. 215; Smith v. State, 23 Ga. 297; Ivey v. State, 23 Ga. 576; State v. Mix, 15 Mo. 153;

ity of memory.¹ The maxim, however, should not be pressed beyond this limit. There are instances, in connection even with an examination in chief, in which a witness may swear falsely in a particular line, and yet with such truthfulness as to the rest of the case that it would work injustice to throw out his testimony entire. It is said, for instance, to be as much a point of honor for an adulterer to shield his paramour under oath, as it is to shield her in conversation.² So a witness's personal assumptions may be false while his relation of external objects may be true. The Chevalier D'Eon, for instance, always testified as a man, but was ultimately proved to be a woman; but in all matters of business the Chevalier D'Eon's word was held indisputable. To cross-examinations these observations are peculiarly applicable. A witness, whom it may be attempted to disgrace, may swear falsely as to some sore point in his history which may be touched, yet truly as to the rest of the case. On account of such falsity it would be a perversion of justice to reject the rest of his evidence. It may be proper to punish the witness for his perjury; it would not be proper to punish the party innocently calling the witness by refusing to believe what was true in the witness's testimony. Nor would it be right to tell a jury, who are sworn to determine a case according to the evidence, that they are to reject that which is probably true in the testimony of a witness because that testimony contains something that is probably false. *Falsa demonstratio non nocet*, is a maxim of universal application, so far as it means that we may reject as surplusage a false description that is not vital to the object of controversy.³ It should be remembered, also, that to decide that a statement is "wilfully" false, requires a fuller exhibition of evidence than can usually be collaterally given. Hence it is that the maxim, *Falsum in uno, falsum in omnibus*, does not generally hold good except in cases where the party calling the witness is cognizant of the falsehood, or where the falsehood goes to the core of the witness's testimony.⁴ *A fortiori*

Paulette v. Brown, 40 Mo. 52; *Troxdale v. State*, 9 Humph. 411.

¹ *Evans v. Lipscomb*, 31 Ga. 71.

² *Infra*, §§ 419, 433.

³ *Broom's Legal Maxims*, 629; and see *infra*, § 945.

⁴ See, generally, *Turner v. Foxall*, 2 Cranch C. C. 324; *Lewis v. Hodgdon*, 17 Me. 267; *Parsons v. Huff*, 41 Me. 410; *Brett v. Catlin*, 47 Barb. 404; *Meixsell v. Williamson*, 35 Ill. 529; *Callanan v. Shaw*, 24 Iowa, 441

is this the case where the misstatement is inadvertent or attributable to the ordinary fluctuations of memory.¹ Nor, when we undertake to test credibility by this standard, should we fail to remember that persons vary very much as to their capacity for remembering details. By some, the recalling of numbers, and of words as previously spoken or written, is a task which can rarely be accomplished; and a vehement effort thus to recall specific words or figures, instead of stimulating, rather distracts the memory. Very few persons can recall the precise terms of a written paper they have not committed to memory; and a failure by a witness to recall such precise terms is what we should expect, and it should not therefore be permitted to discredit the witness.²

§ 413. If several persons are sent to report the proceedings of a public meeting, and if, without pretending to be perfect stenographers, they should bring in reports of proceedings and speeches exactly coincident, we would say, "either all the reports are fabrications, or one report is the original from which the others were copied."

Literal coincidence of oral statements a ground for suspicion.

To witnesses called, not because they had previously been sent to make a report, but because it transpired subsequently that they had been at the meeting in question, these observations apply with even greater strength. As such witnesses are under oath, we would have a right to say, "The whole testimony bears the marks of concoction; to all but one of the witnesses, at least, perjury is assignable."³ "Substantial truth, under circumstantial variety," is the true test of reliable testimony;⁴ and the circumstantial variety expands or contracts in multiplicity in proportion as the witness examined has margin of observation, and is left to his own faculties to reproduce what he sees or hears. If two sheets printed from the same type should differ even in a comma,

Mercer v. Wright, 3 Wise. 645; *State v. Williams*, 2 Jones (N. C.) L. 257; *State v. Brantley*, 63 N. C. 518; *Lavenburgh v. Harper*, 27 Miss. 299; *People v. Strong*, 30 Cal. 151.

¹ *Giltner v. Gorham*, 4 McLean, 402; *Miller v. Stem*, 12 Penn. St. 383; *Brennan v. People*, 15 Ill. 511; *Crabtree v. Hagenbaugh*, 25 Ill. 233;

Blanchard v. Pratt, 37 Ill. 213; *Shanks v. Hayes*, 6 Ind. 59; *State v. Peace*, 1 Jones (N. C.) L. 251; *Jones v. Laney*, 2 Tex. 342; *Yoes v. State*, 9 Ark. 42.

² *Jackson v. McVey*, 18 Johns. R. 330. *Supra*, § 410.

³ See Greenl. Test. of the Evangel. § 134; *Brougham's Speeches*, i. 215.

⁴ *Paley's Evidence*, part iii. ch. i.

we should attribute it to carelessness in the printer, and the variation would cause us much surprise. On the other hand, we would be still more surprised if two persons, who had read the same page a week ago, and who were not charged with committing it *memoriter*, should repeat it to us word for word, and comma for comma. It is in this sense that we are to understand Aristotle's famous axiom, Τῷ μὲν γὰρ ἀληθεῖ πάντα συνᾶδει τὰ ὑπαρχοντα, τῷ δὲ ψευδὲι ταχὺ διαφανεῖ τὰ ἀληθές. As to *substance*, harmony is one of the conditions of truth; as to *form*, wherever there is truth and liberty there is variety.

§ 414. Evidence in criminal issues not being within the range of the present work, it is unnecessary to dwell on the limitations by which in treason and in perjury two witnesses have been regarded as necessary to a conviction.¹ In civil issues, with but few exceptions, a case can be made out by a single witness. In cases of bastardy, however, it is necessary, to sustain an order of affiliation, that the evidence of the mother should be corroborated, in some material particular, by other testimony.² In equity suits, as we will see hereafter,³ when a defendant denies the plaintiff's case *in toto*, it requires something more than a single witness to sustain the plaintiff's case.⁴ Under the New York Code, a verified answer is not evidence, and hence two witnesses are not necessary in a case where there is a verified answer, in the pleadings, denying the plaintiff's case.⁵

In divorce cases, the testimony of a party, uncorroborated, has been held insufficient to establish adultery.⁶ It should at the same time be remembered that we have derived this limitation from the English ecclesiastical courts, whose jurisdiction is now reduced almost to a nullity, and whose judges considered them-

¹ See Whart. Cr. Law (7th ed.), § 801 *et seq.*, in which these topics are treated.

² *R. v. Roberts*, 2 C. & K. 614; *Hodges v. Bennett*, 5 H. & N. 625; *R. v. Read*, 9 A. & E. 619.

³ *Infra*, § 487.

⁴ See strong expressions to this effect in *Down v. Ellis*, 35 Beav. 578; *Nunn v. Fabian*, 35 L. J. Ch. 140. *Hartford v. Power*, 8 I. R. Eq. 602.

As to practice when parties are examined as witnesses, see *infra*, § 487.

⁵ *Stilwell v. Carpenter*, 62 N. Y. 639.

⁶ *Thayer v. Thayer*, 101 Mass. 111; *Tate v. Tate*, 26 N. J. Eq. 55; *Black v. Black*, 26 N. J. Eq. 431; *Bronson v. Bronson*, 8 Phila. R. 261; *Hays v. Hays*, 19 Wisc. 182; *Fugate v. Pierce*, 49 Mo. 446.

selves bound by canon law to refuse a decree upon the testimony of a single witness, unless supported by "adminicular circumstances."¹ "This doctrine was in former days productive of much injustice;"² and is now abandoned even as to divorce cases by the statutory prescription of the rules of evidence observed in the superior courts of common law.³ In this country, while the limitation was never accepted as absolute,⁴ the better opinion, as is elsewhere stated, is, that whenever corroboration is from the nature of the case practical, there a divorce will not be granted on the unsupported testimony of a party.⁵

In suits based on the supposed perjury of the defendant, as much evidence, it has been said, is required to sustain a verdict as is required in prosecutions for perjury.⁶

So, when a witness is a *particeps criminis* his testimony, without corroboration, is entitled to little weight.⁷

Parties, as will hereafter be seen, being now admissible as witnesses, the question as to the weight of a party's testimony, when given in response to a bill in chancery, may be regarded as settled. A party is now to be received as would be any other witness, and his credibility is for the jury as is that of other witnesses.⁸

With the qualifications above noticed, a judgment may be rested on the testimony of a single witness. How far such testimony is to be believed is to be determined by the circumstances of the particular case. The presumptions to be invoked are of fact and not of law. In cases where the statements of the witness are improbable, or are those of a *particeps criminis*, slight credit will be given;⁹ in other cases, where a witness's character is unimpeached, and no attempt is made to contradict him, his single testimony is enough to prove a case.¹⁰

¹ See Taylor's Ev. § 883, citing *Donellan v. Donellan*, 2 Hagg. Ecc. R. 144; *Simmonds v. Simmonds*, 5 Ec. & Mar. Cas. 324; *Hutchins v. Denziloe*, 1 Const. R. 181.

² Taylor's Ev. § 883.

³ See *U.*, falsely called *T., v. J., L.* R. 1 P. & D. 461.

⁴ Bishop, Mar. & Div. § 278.

⁵ See *infra*, § 433.

⁶ *Laughran v. Kelly*, 8 Cush. 199.

⁷ Whart. Cr. Law (7th ed.), § 783.

⁸ See *infra*, § 490.

⁹ *Sunday v. Gordon*, Blatch. & H. 569; *Lyon v. Lyon*, 62 Barb. 138; *Donohue v. Henry*, 4 E. D. Smith, 162; *Prince v. Prince*, 25 N. J. Eq. 310; *Kittering v. Parker*, 8 Ind. 44; *Blankman v. Vallejo*, 15 Cal. 638; *Evans v. Evans*, 41 Cal. 103.

¹⁰ See *Ford v. Haskell*, 32 Conn.

§ 415. It is an ordinary conclusion of logic that the testimony of a credible witness, that he saw or heard a particular thing at a particular time and place, is more reliable than that of an equally credible witness who, with the same opportunities, testifies that he did not see or hear such thing at such time and place.¹ It should be added, however, that the weight to be attached to the negative witness depends upon the exhaustiveness of his observation. Put an intelligent and credible witness in a small chamber, open throughout to his scrutiny, and his testimony that in that chamber, at a given time, an event did not occur which could not have occurred without his observation, is entitled to the same weight with that of a witness who, equally intelligent and credible, should swear to the occurrence of the event at the same time.² A negative witness, also, whose attention is concentrated on a particular point, may outweigh an affirmative witness whose attention has

489; and see *Sugden v. St. Leonards*, cited *supra*, §§ 138-9.

¹ *Stitt v. Huidekopers*, 17 Wall. 384; *Ralph v. R. R.* 32 Wise. 177; *Johnson v. State*, 14 Ga. 55; *Todd v. Hardie*, 5 Ala. 698; *Pool v. Devers*, 30 Ala. 672; *Hepburn v. Bk.* 2 La. An. 1007; *Auld v. Walton* 12 La. An. 129; *Coles v. Perry*, 7 Tex. 109.

"One of the errors assigned and insisted on grows out of the conflict in the testimony between the plaintiff and the two defendants, all of whom were sworn as to two papers, which the defendants aver were signed by them and delivered to the plaintiff at the time the escrow was signed, one of which limited the time within which the plaintiff could pay the money and take up the deed to the 1st of December, and the other agreed to give him \$2,500 out of the \$40,000 so paid. No such papers were produced, and on this point the testimony is conflicting. The plaintiff denies the receipt of any such papers, and both the defendants swear positively to their delivery to plaintiff.

"On this subject the court charged the jury 'that it is a rule of presumptions that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed.'

"We are of opinion that the charge was a sound exposition of a recognized rule of evidence of frequent application, and that the reason of the rule, as stated in the charge, dispenses with the need of further comment on it here." *Miller, J., Stitt v. Huidekopers*, 17 Wall. 393, 394.

² *Johnson v. Whidden*, 32 Me. 230; *Campbell v. Ins. Co.* 98 Mass. 381; *Pollen v. Le Roy*, 10 Bosw. (N. Y.) 38; *Coughlin v. People*, 18 Ill. 266; *Greenville v. Henry*, 78 Ill. 150; *Blakey v. Blakey*, 33 Ala. 611; *Fox v. Matthews*, 33 Miss. 433; *State v. Gates*, 20 Mo. 400. See *Sobey v. Thomas*, 39 Wise. 317; *Bemis v. Becker*, 1 Kans. 226.

not been so concentrated.¹ On the other hand, as the space covered by a negative witness becomes undetermined, his testimony loses in weight.² Thus a witness who swears that a party did not receive value for a promissory note, cannot counterbalance a witness who swears to a transaction transferring such value.³

§ 416. Supposing, however, the witnesses on the one side are equal in intelligence, opportunities of observation, memory, and truthfulness, to the witnesses on the other side, what rule is to be followed? Indubitably, in such case, the decision should follow the greater number of witnesses, when the disproportion is marked. Two witnesses, all other things being equal, are less likely to be mistaken than one.⁴ Where, however, the numbers on each side are large, no artificial rule of this order can be applied.⁵ Nor should it be forgotten that one witness, corroborated by facts or documents, may outweigh a multitude whose testimony may have been the result of imperfect observation, or have been influenced by prejudice.⁶

§ 417. Credibility, based upon such considerations as those just noticed, is, it should be always remembered, for the jury, under such instructions, as to the reason of the case, as may be given by the court. It should at the same time be equally kept in mind that the presumptions usually invoked in this relation are presumptions of fact, based on free logic, and are not presumptions of technical law.⁷ It need scarcely be added that the importance of applying psychological tests, resting on the motives which may lead a witness to deceive,

When credit of witnesses is equal, preponderance to be given to number.

Credibility is for jury.

¹ *Reeves v. Poindexter*, 8 Jones (L.) N. C. 308.

² *Abel v. Fitch*, 20 Conn. 90; *Thomas v. De Graffenreid*, 17 Ala. 602.

³ *Matthews v. Poythress*, 4 Ga. 287.

⁴ See *Dowdell v. Neal*, 10 Ga. 148.

⁵ *Cockburn, C. J.*, in *Tichborne case*; *M'Lees v. Felt*, 11 Ind. 218; *Glenn v. Bank*, 70 N. C. 191. See *Sanborn v. Babcock*, 33 Wise. 400.

⁶ See *supra*, § 8; and see *McCrum v. Corby*, 15 Kans. 112.

⁷ *Supra*, § 124; *Ray v. Donnell*, 4 M'Lean, 504; *Burtus v. Tisdall*, 4 Barb. 571; *Harrison v. Brock*, 1 Munf. 22; *French v. Millard*, 2 Oh. St. 44; *Lewis v. Lewis*, 9 Ind. 105; *Terry v. State*, 13 Ind. 70; *Kinchelow v. State*, 5 Humph. 9; *Ridley v. Ridley*, 1 Coldw. 323; *Hardee v. Williams*, 30 Ga. 921; *Moore v. Jones*, 13 Ala. 296; *Comstock v. Rayford*, 20 Miss. 369; *Shellabarger v. Nafus*, 15 Kans. 547. Among these presumptions may be noticed those drawn from the witness's manner. *Ibid.*

or the character which deprives him of trustworthiness, is enhanced by the statutory removal of disqualification from interest, from infancy, and from atheism.

§ 418. When the court is satisfied that a witness is so drunk as to be unable to testify, he may be excluded, or his examination postponed till he is sober.¹ But to exclude a witness it is not sufficient that he has been found to be a habitual drunkard, under the statute.² The use of opium cannot be introduced to impair credit, unless it be shown that the witness was under the influence of opium when examined, or when the litigated event occurred.³

§ 419. It is unnecessary at present to do more than allude to the reasons which have led, both in England and the United States, to the abrogation of the old common law rule excluding interested parties. The impolicy of such exclusion has been shown by Mr. Bentham with a quaint vigor which leaves little to be done by those who follow in the same line. We have already noticed the untruth of the assumption that a pecuniary interest is stronger than other interests; and the same reasoning⁴ that leads to the rejection of witnesses in one case of interest would justify their rejection in all other cases of interest. Yet if all kinds of interest should disqualify witnesses, few witnesses could be sworn, for there are few witnesses who in some way are not interested in the cases as to which they are called upon to testify. As, therefore, it is impossible to exclude all interested witnesses, the question arises why pecuniary interest alone should disqualify. Is pecuniary interest more intense than other forms of interest? It may be; but it is by no means the interest most likely to cause a witness to speak untruthfully. Men dealing with money are likely to be more exact in their words than those not accustomed so to deal. A business man knows that he has to pay such penalties for exaggeration that, as a usual thing, he refrains from exaggeration. A business man who does not keep his word is disgraced, and

¹ *Hartford v. Palmer*, 16 Johns. R. 143; *Gould v. Crawford*, 2 Barr, 89; *State v. Underwood*, 6 Ired. 96.

² *Gebhart v. Shindle*, 15 S. & R.

³ *McDowell v. Preston*, 26 Ga. 528. As to insane witnesses, see *supra*, §§ 401, 402.

⁴ *Supra*, § 408.

ceases to be a business man. Such men hold truth peculiarly sacred, not simply from the love of truth, but because falsehood to them is ruin. By the common law, however, a business man with an interest of a penny in a case was excluded, while a witness who is bound to one of the parties by the most passionate ties was nevertheless a witness for such party. Who, for instance, is more likely to swear for another through thick and thin than an associate in a raid which strongly excites partisan sympathy? Nor does this spring necessarily from a conscious desire to pervert truth. In collision cases, for instance, all the witnesses may be honest; yet there are few collision cases, as has been already noticed, in which each witness does not swear with his ship. In riots, also, in which the responsibility of two warring factions is involved, it is notorious that the witnesses belonging to each faction swear together, even in respect to issues as to which it is impossible to give credit to the one body of witnesses without imputing perjury to the other body. Party spirit, to ascend to a higher line of illustration, makes us unwilling to see, and, *a fortiori*, unwilling to narrate, that which is disadvantageous to those to whom we are attached; and even if our perceptions are not thus affected, between a willing and an unwilling witness the practical difference is great. And stronger than party spirit are to be reckoned those strong family instincts which render the parent ready to make great sacrifices on behalf of the child, the child on behalf of the parent, the brother on behalf of the brother. Attachments such as these may take hold of weak minds and so warp them as to make them unconscious of the falsity of their false statements, while the influence wrought by a pecuniary interest is usually one of which the witness himself is conscious; and he belongs to a class peculiarly susceptible to the difference between the true and the false, which is the most exposed to ruin from speaking falsehood, and which is obliged to attach peculiar sanctity to truth. This line of reasoning, coupled with a growing consciousness that the truth, in judicial investigations, is best brought out by the exhibition of all relevant testimony, has led to the now universal statutory abrogation of the old rule excluding parties and persons having a pecuniary take in the issue.¹

¹ See *Sorg v. First German Cong.* 63 Penn. St. 156; *Forrester v. Tor-*

§ 420. It has been doubted whether a lawyer who, in any capacity, has addressed a jury in a cause, may be permitted to testify in the same cause as a witness;¹ though as this might in extraordinary cases work injustice, the exclusion should be confined to those instances in which the attempt is recklessly and unnecessarily to unite the functions of counsel and witness.² The mere fact that the case has been opened by an attorney, who has previously cross-examined witnesses on the other side, does not make him incompetent as a witness for his client.³ Where, however, counsel thus become witnesses, it may be a proper exercise of the discretion of the court to prohibit them from subsequently addressing the jury on the case thus made up; and the testifying of the counsel should be confined to extreme cases as to which there is no other proof.⁴ But, as a general rule, a lawyer is a competent witness in a case he is trying or directing.⁵

rence, 64 Penn. St. 29; *Knerr v. Hoffman*, 65 Penn. St. 126; *Dailey v. Monday*, 32 Tex. 141.

¹ *Stones v. Byron*, 9 D. & L. 393; *Deane v. Packwood*, 9 D. & L. 395; *Carrington v. Holabird*, 17 Conn. 530; *Quarles v. Waldron*, 20 Ala. 217.

² *State v. Cook*, 23 La. An. 347. See *Tilton v. Beecher*, Pamph. Rept., for an illustration of a case in which such testimony was admitted.

³ *Follansbee v. Walker*, 72 Penn. St. 228.

⁴ See *Cobbett v. Hudson*, 1 E. & B. 11; *Ross v. Demoss*, 45 Ill. 447; *Madden v. Farmer*, 7 La. An. 580; *Boissy v. Lacou*, 10 La. An. 29. As to Georgia statute, excluding attorneys from testifying for their clients, see *Churchill v. Corker*, 25 Ga. 479; *Hines v. State*, 26 Ga. 614; *Sharman v. Morton*, 31 Ga. 34.

⁵ *Potter v. Ware*, 1 Cush. 519; *Tullock v. Cunningham*, 1 Cow. 256; *Folly v. Smith*, 7 Halst. 139; *Bell v. Bell*, 12 Penn. St. 235; *Follansbee v. Walker*, 72 Penn. St. 230; *Morgan v. Roberts*, 38 Ill. 65; *Abbott v. Stribley*, 6 Iowa,

191; *State v. Woodside*, 9 Ired. 496; *Morrow v. Parkman*, 14 Ala. 769; *Grant's Succession*, 14 La. An. 795.

“On the trial of this case, A. S. Foster, Esq., was offered as a witness on the part of the defence, objected to by the plaintiff's counsel, and rejected by the court for the following reason: ‘Mr. Foster is attorney for the defendant Follansbee, opened the case for him to the jury, and examined the witnesses for said defendant, and the court on this ground excludes him as a witness.’ This is assigned for error.

“In *Frear v. Drinker*, 8 Barr, 521, Mr. Justice Rogers says: ‘It is also contended an attorney is not a competent witness for his client. In England, it has been lately ruled that an attorney is not to give evidence under certain circumstances.’ He cites two cases before Mr. Justice Patteson and Mr. Justice Erle, and he says, ‘The furthest the court has yet gone is to discourage the practice of acting in the double capacity of attorney and witness, but there is nothing to pro-

V. DISTINCTIVE RULES AS TO HUSBAND AND WIFE.

§ 421. Where the relation of husband and wife under the local law makes either incompetent as a witness for or against the other, it is necessary, to work such incompetency, that a valid marriage should be proved. *Primâ facie* every person is competent to testify in all issues; if he is to be excluded by the policy of the law, the burden is on the party objecting to him to show the reason for such ex-

Husband or wife incompetent in each other's suits at common law.

hibit an attorney from being a witness for his client, when he does not address the jury. It is said, and I agree, that it is a highly indecent practice for an attorney to cross-examine witnesses, address the jury, and give evidence himself to contradict the witnesses. It is a practice which, as far as possible, should be discountenanced by courts and counsel. But these cases are not open to this objection, because it appears negatively that the counsel did not address the jury. It is sometimes indispensable that an attorney, to prevent injustice, should give evidence for his client.' In the earlier cases in Pennsylvania, the objection to the examination of the attorney in the cause was his interest in it, as in the case of the late Judge Baldwin, in *Miles v. O'Hara*, 1 S. & R. 32, in 1814. In the first case, *Newman v. Bradley*, 1 Dallas, 240, in the year 1788, Howell, who was of counsel for the plaintiff, gave the chief evidence to support the action, and he and Tod argued the cause before the jury, and there was a verdict for the plaintiff. 'When Howell offered himself as a witness, Levy objected that he was interested, inasmuch as his judgment fee depended on his success in the cause. But the objection was overruled by the court.' The two English cases cited by Judge Rogers have since been overruled. Pitt Taylor, in the second volume of

his Treatise on the Law of Evidence, p. 1170, § 1240, 4th ed., thus states the law: 'The judges at nisi prius were at one time inclined to regard as incompetent to testify all persons, whether counsel, attorneys, or parties, who, being engaged in a cause, had actually addressed the jury on behalf of that side upon which they were afterwards called to give evidence. Further investigation of the subject, however, has led to a judicial acknowledgment that no such practice exists.' The authority for this, *Corbett v. Hudson*, 22 L. J. Q. B. 11, 1852, the judgment of the court (of which Mr. Justice Erle was one) being delivered by Lord Campbell, C. J.

"The question may, therefore, be considered as settled in England and Pennsylvania, and also in Massachusetts. *Potter v. Inhabitants of Ware*, 1 Cush. 519. There was therefore error in holding Mr. Foster was not a competent witness." Read, C. J., *Follansbee v. Walker*, 72 Penn. St. 230.

By the Roman law no attorney is permitted to testify as to a matter in which he is professionally employed, and this prohibition includes all confidential professional agents. See L. 25, D. xxii. 5; and see Heffter, Civil Proc. 205.

Privilege in professional communications is hereafter discussed. *Infra*, § 576.

clusion. Intimate sexual relations do not constitute such reason, even though disguised by a pretended though invalid marriage.¹ Where a man and a woman lived, as they supposed, as husband and wife, but separated, in consequence of the woman discovering that a former husband, believed to be dead, was still alive, it was held that the woman was a competent witness against such a man, with whom she thus lived as a second husband, even as to facts she learned from him during their cohabitation.² For when a former existing marriage is conceded, no subsequent marriage, no matter how solemn, can operate to invest witnesses with incapacities which a valid marriage alone can establish.³

¹ *Batthews v. Galindo*, 4 Bing. 610; *S. C.* 3 C. & P. 238; *Campbell v. Twemlow*, 1 Price, 31; *Divoll v. Leadbetter*, 4 Pick. 220; *People v. McCraney*, 6 Parker C. R. 49; *State v. Taylor*, Phill. (N. C.) L. 508; *Flanagin v. State*, 25 Ark. 92.

² *Wells v. Fletcher*, 5 C. & P. 12; *People v. McCraney*, 6 Parker C. R. 49.

³ *R. v. Serjeant*, Ry. & M. 354; *R. v. Jones*, C. & M. 614; *R. v. Madden*, 14 Up. Can. Q. B. 588; *State v. Patterson*, 2 Ired. 346; *Finney v. State*, 3 Head (Tenn.), 544; *State v. Johnson*, 12 Minn. 476.

It is said that Lord Kenyon once rejected a woman, called as a witness for a putative husband, to whom she was never married, but who acknowledged her as his wife; *Anon.*, cited by Richards, B., in 1 Price, 83; but in that case the criminal had, *throughout the trial*, admitted that the witness was his wife, and was thus in a manner estopped from denying the marriage when her competency was questioned; and in the subsequent case of *Batthews v. Galindo*, 4 Bing. 610, 612, 613; 3 C. & P. 238, and 1 M. & P. 565, *S. C.*, where Lord Kenyon's ruling was discussed, Park and Burroughs, JJ., declared that his decision was founded on this admission, and the whole court determined that a kept mistress was a competent witness for

her protector, though she passed by his name and appeared to the world as his wife. The same view was afterwards taken even as to confidential communications between persons untruly believing themselves husband and wife; though in the latter case the parties had separated before the trial, on hearing that a former husband of the woman was still alive. *Wells v. Fletcher*, 5 C. & P. 12, per Patteson, J.; *S. C.*, *nom. Wells v. Fisher*, 1 M. & Rob. 99, and n. It seems, also, from this last case, and from several others; *R. v. Peat*, 2 Lew. C. C. 288; *R. v. Wakefield*, *Ibid.* 279; 1 Russ., C. & M. 218, n. t; that a supposed husband or wife may be examined on the *voir dire* to facts showing the invalidity of the marriage; and it is apprehended that no valid reason can be given for not admitting their evidence thus far, though the fact that the marriage ceremony has been actually performed may have been previously proved by independent testimony; *R. v. Bramley*, 6 T. R. 330; *R. v. Bathirick*, 2 B. & Ad. 646, where Lord Tenterden observed, "that it might well be doubted, whether the competency of a witness can depend upon the marshalling of the evidence, or the particular stage of the cause at which the witness may be called. Taylor's Ev. § 1231.

§ 422. Marriage, however, being proved, neither husband or wife is competent at common law to testify in a suit for or against the other,¹ nor can either be admitted as a witness to sustain the other's interests.² An exception to this rule exists in prosecutions for violence committed by husband on wife, in which cases the wife may be examined as a witness against the husband,³ or for him.⁴

§ 423. In cases in which a party could be a witness for himself, marital disqualification ceases.⁵ Thus, even at common law, a wife can be a witness for her husband, to prove the contents of his lost trunk in an action against the carrier.⁶ So a merely contingent reversionary interest in the husband, he not being a party, does not exclude the wife.⁷ So a wife may testify to her husband's original entries, when she keeps his books for him.⁸ So in a suit brought by an infant through his *prochein ami*, it is no objection to the admissibility of a witness that she is the wife

¹ *R. v. Smith*, 1 Mood. C. C. 289; *R. v. Payne*, 12 Cox C. C. 110; *State v. Welsh*, 26 Me. 30; *Kelley v. Proctor*, 41 N. H. 139; *Blain v. Patterson*, 48 N. H. 151; *Manchester v. Manchester*, 24 Vt. 649; *Seargent v. Seward*, 31 Vt. 509; *Com. v. Marsh*, 10 Pick. 57; *Lucas v. State*, 23 Conn. 18; *Bird v. Davis*, 14 N. J. Eq. 467; *Copous v. Kauffman*, 8 Paige, 583; *Hasbrouck v. Vandervoordt*, 9 N. Y. 153; *Snyder v. Snyder*, 6 Binney, 488; *Pringle v. Pringle*, 59 Penn. St. 281; *Miller v. Williamson*, 5 Md. 219; *Corse v. Patterson*, 6 Har. & J. 153; *Kyle v. Frost*, 29 Ind. 382; *Taulman v. State*, 37 Ind. 353; *Mountain v. Fisher*, 22 Wise. 93; *Osborn v. Black*, Speers (S. C.), 431; *Williams v. State*, 44 Ala. 24; *Tulley v. Alexander*, 11 La. An. 628; *State v. Berlin*, 42 Mo. 572; *Smead v. Williamson*, 16 B. Mon. 492; *Gilkey v. Peeler*, 22 Tex. 663; *Whitehead v. Foley*, 28 Tex. 268.

² *Dwelly v. Dwelly*, 46 Me. 377; *Hosack v. Rogers*, 8 Paige, 229; *Marsh-*

man v. Conklin, 17 N. J. Eq. 282; *Cobb v. Edmondson*, 30 Ga. 30; *Caperton v. Callison*, 1 J. J. Marsh. 397; *Wilson v. Sheppard*, 28 Ala. 623; *Cull v. Herwig*, 18 La. An. 315. See the authorities for this rule in its criminal relations in Whart. Cr. Law, 7th ed. § 768 *et seq.*

³ Whart. Cr. Law, 7th ed. § 769; *R. v. Sergeant*, R. & M. 352; *People v. Fitzpatrick*, 5 Parker C. R. 26.

⁴ *Com. v. Murphy*, 4 Allen, 491; *State v. Neill*, 6 Ala. 685. See *State v. Bennett*, 31 Iowa, 24.

⁵ *Jackson v. Bard*, 4 Johns. R. 230; *Sneckner v. Taylor*, 1 Redf. (N. Y.) 427; *Peaceable v. Keep*, 1 Yeates, 576; *Daniel v. Proctor*, 1 Dev. (Law) 428.

⁶ *McGill v. Rowand*, 3 Penn. St. 451; *Illinois R. R. v. Taylor*, 21 Ill. 323; *Sasseen v. Clark*, 37 Ga. 242.

⁷ *Dyer v. Homer*, 22 Pick. 253; *Town v. Needham*, 3 Paige, 546.

⁸ *Littlefield v. Rice*, 10 Mete. 287. See *Perry v. Whitney*, 30 Vt. 390.

of the *prochein ami*.¹ So the wife, in a *habeas corpus* brought by her husband to obtain her custody, may testify to acts of cruelty committed by him.²

§ 424. In suits in which either husband or wife is a party, either the man or the woman may be examined on the *voir dire* as to such marriage;³ though to establish the marriage, proof *aliunde* must be adduced. The reasoning is simply this: if the marriage is valid, the witness is not competent; admitting that which he is offered to prove, then he is incompetent as a witness in the suit. This conclusion, however, does not apply to police or collateral inquiries.⁴ Thus it has been held in Pennsylvania, that a woman is a competent witness to prove the contract of marriage in a proceeding by the guardians of the poor to compel the alleged husband to contribute to her support.⁵ So a wife, when her children's legitimacy is at issue, may testify to the validity of the marriage.⁶ To invalidate a second marriage, by proving the existence of a first marriage, either party is competent.⁷

§ 425. It cannot be safely held that a wife's testimony cannot be received when it tends to criminate the husband; because, however important it may be that the husband should not be convicted and punished on such testimony, it is equally important that in suits between strangers, justice should not be denied in order to sustain a privilege which under such circumstances rests mainly on sentiment. In a suit between A. and B., when C. is called as a witness by B., and gives testimony which is perjured, to refuse to permit

¹ *Leavitt v. Bangor*, 41 Me. 458; *Bonett v. Stowell*, 37 Vt. 258.

² *People v. Mercein*, 8 Paige, 47.

³ *Seeley v. Engell*, 13 N. Y. 542.

⁴ *R. v. Peat*, 2 Lew. C. C. 288; *R. v. Bramley*, 6 T. R. 330; *R. v. Bathwick*, 2 B. & Ad. 646; *R. v. Bienvenu*, 15 Low. C. J. 181; *Scherpf v. Szadeczky*, 4 E. D. Smith, 110; *Redgrave v. Redgrave*, 38 Md. 93; *Williams v. State*, 44 Ala. 24. In New York, however, under the statute permitting a wife to testify in matters affecting her husband, she may testify in her

own behalf, in a suit of divorce brought by her, to prove a marriage. *Bissell v. Bissell*, 55 Barb. 325. But at common law, either husband or wife may be a witness to prove marriage collaterally in all cases in which proof of the marriage would not make the witness incompetent. *Willis v. Underhill*, 6 How. N. Y. (Pr.) 396.

⁵ *Guardians of the Poor v. Nathans*, 2 Brewst. 149.

⁶ *Christy v. Clarke*, 45 Barb. 529.

⁷ *Shaak's Est.* 4 Brewst. 305.

C.'s wife to be examined, to show C.'s untruthfulness, would be to sacrifice the justice of the cause, and this to maintain privileges which C. has forfeited. Hence it has been held, that a man or a woman may testify in a collateral case to matters which tend to criminate the man's wife or the woman's husband.¹ Yet while such testimony will be *admitted*, it will not be *compelled*. A wife, for instance, such is the tendency of authority, will not be compelled, against her protest, to charge her husband, even collaterally, with crime.² As to matters disgracing, though not criminating, an answer will be compelled.³ How far common disability in this respect is modified by recent statutes, so far as concerns criminal law, is discussed in another treatise.⁴ How far such statutes affect civil cases will be considered in a future section of this chapter.⁵

§ 426. It has been ruled in Canada that on an indictment for bigamy the first wife is inadmissible for the defence to prove that her marriage is invalid.⁶ This, however, is founded on a *petitio principii*. The question is whether the first marriage is valid. If so, she is not a witness; but she is a witness if such marriage is invalid. For the court to refuse to admit her, when called by the defence, to disprove the marriage, is to prejudice the question in issue.

In prosecutions for bigamy, lawful wife cannot prove marriage.

¹ See *infra*, § 432; *R. v. Bathwick*, 2 B. & Ad. 639; *R. v. All Saints*, 6 Maule & S. 194; *R. v. Halliday*, 8 Cox, 298; *Henman v. Dickinson*, 5 Bing. 183; *Com. v. Reid*, 8 Phila. R. 609.

² *Cartwright v. Green*, 8 Ves. 405; *R. v. All Saints*, 6 Maule & S. 200; *State v. Briggs*, 9 R. I. 361; *Com. v. Reid*, 8 Phila. R. 385. See fully *infra*, § 432.

³ *Ware v. State*, 35 N. J. L. 553.

"The question whether a wife is bound to answer questions criminating her husband is not in a satisfactory state. It was held at common law, in *R. v. Claviger*, 2 T. R. 268, that a wife could not be compelled to answer questions criminating her husband. In *R. v. Worcester*, 6 M. & S. 194,

Lord Ellenborough held that a wife was competent to answer such questions, and that the answers were not excluded on the ground of public policy; but Bayley, J., was of opinion that a wife who threw herself upon the protection of the court would not be compelled to answer. In equity there is no doubt that a wife cannot be compelled to answer any question which may expose her husband to a charge of felony. *Cartwright v. Green*, 8 Ves. 410." *Powell's Evidence* (4th ed.), 110.

⁴ *Whart. Cr. Law* (7th ed.), § 767 *et seq.*

⁵ See *infra*, § 432.

⁶ *R. v. Madden*, 14 Up. Can. Q. B. 588; *R. v. Tubbee*, 1 Up. Can. P. R. 103.

That she cannot be called to sustain the marriage is clear, for she is excluded by the very hypothesis she is called to support. The proper course is to examine her on her *voir dire*. If she claims to be the first wife, on her own showing she is inadmissible. If she denies that she was married to the defendant, then she should be admitted, and the jury directed to disregard her testimony if they believe her to be the defendant's wife.¹ Otherwise material testimony might be excluded on a hypothesis not only artificial but false. On the other hand, if a man be prosecuted for bigamy, his first wife, the validity of whose marriage is assumed by the prosecution, cannot be called to prove her marriage with the defendant.² The first marriage being established, the woman, with whom the second marriage was had, is a competent witness either for or against the prisoner; for the second marriage is void.³ It is said, indeed, that if the proof of the first marriage were doubtful, and the fact were controverted, the witness could not be admitted.⁴ It has, however, been argued by a respectable authority that the lawful wife, though incompetent as a witness, may appear in court for the purpose of being identified, although by this process suspicion may attach to her husband; it being said, by way of illustration, that she may be thus produced to be identified as having passed a note which he is charged with having stolen.⁵

§ 427. Independent of the question of interest, the law, in view of the high importance of preserving intact the confidence and security of the marriage state, regards confidential communications between husband and wife as privileged, and refuses to permit either to be interrogated as to what occurred in their confidential intercourse during their marital relations.⁶ The privilege, however, is personal to the parties; a third person, who happened to

¹ Peat's case, 2 Lewin, 288; *R. v. Wakefield*, Ibid. 279; which cases, however, only intimate such a course, without positively sanctioning it.

² Grigg's case, T. Ray. 1; 1 Hale, 693; 1 Russ. C. & M. 218; Whart. Cr. Law (7th ed.), § 768 *et seq.*; and see *supra*, § 421.

³ B. N. P. 287; *R. v. Serjeant*, Ry.

& M. 354, per Abbott, C. J., and cases cited, §§ 423-5.

⁴ Grigg's case, T. Ray. 1.

⁵ Alison, Pract. of Cr. Law, 463; Taylor's Evidence, § 1231.

⁶ Dexter v. Booth, 2 Allen, 559; Baldwin v. Parker, 99 Mass. 79; Raynes v. Bennett, 114 Mass. 424; Drew v. Tarbell, 117 Mass. 90; Brad-

overhear a confidential conversation between husband and wife, may be examined as to such conversation.¹ Nor does the privilege extend to conversations with third parties which the wife overheard;² nor does it protect conversations between husband and wife overheard by third parties;³ though it is otherwise if such third persons are infants, taking no part in the conversation.⁴ The privilege, also, extends only to confidential communications, and does not cover knowledge derived from general intercourse.⁵

ford v. Williams, 2 Md. Ch. 1; Wadams v. Humphrey, 22 Ill. 661; Costello v. Costello, 41 Ga. 613; Wade's Succession, 21 La. An. 343. A husband, under the Massachusetts statute, cannot be admitted to testify as to his private conversations with his wife, so as to charge his wife with liability based on such conversations. Drew v. Tarbell, 117 Mass. 90. So under Missouri statute; Moore v. Wingate, 53 Mo. 398; though in other respects either husband or wife may be a witness for the other. Chesley v. Chesley, 54 Mo. 347.

¹ Conn. v. Griffin, 110 Mass. 181.

² Mercer v. Patterson, 41 Ind. 440.

³ State v. Center, 35 Vt. 379; Keator v. Dimmick, 46 Barb. 158; Allison v. Barrow, 3 Coldw. 414. On this point see Westerman v. Westerman, 25 Oh. St. 500; cited *infra*, § 431.

⁴ "The conversation between the husband and wife appears by her testimony to have been had in the presence of no other person except their family of young children, who are not shown to have taken any part in, or paid any attention to, the conversation. It must, therefore, be deemed incompetent evidence as a private conversation between husband and wife. Dexter v. Booth, 2 Allen, 559; Bliss v. Franklin, 13 Allen, 244; St. 1870, c. 393, § 1." Gray, C. J., Jacobs v. Hesler, 113 Mass. 160.

⁵ The point in the text is thus discussed: "The widow of the intestate Whitcomb was not a party, nor one of the parties to the suit; Gen. Sts. c. 131, § 14; nor was the contract or cause of action made or transacted with her in the lifetime of her husband and in his absence. St. 1865, c. 297, § 2. Her competency as a witness in this case does not depend upon the recent statutes. The disqualification of pecuniary interest, which formerly excluded parties, is indeed now removed; but the rules of the common law, founded on public policy, which relate to the competency of the wife to testify for or against her husband, still prevail. Upon the point pressed by the plaintiff in review, — that this disqualification of the wife, continuing after the death of her husband, is not limited to private conversations between them during marriage, but extends to all facts and transactions which then came to her knowledge, — it is enough to say that the contrary has been recently decided by this court in a case like the one here presented. Robinson v. Talmadge, 97 Mass. 171; Dexter v. Booth, 2 Allen, 559; Kelly v. Drew, 12 Allen, 107; Coffin v. Jones, 13 Pick. 411, 415." Colt, J., Litchfield v. Merritt, 102 Mass. 524. See, as bearing on this topic, Tracy v. Kelley, 52 Ind. 535.

As to statutory changes in this respect see *infra*, §§ 430-1.

§ 428. Whether the incompetency of husband and wife as witnesses in suits in which either is concerned is a privilege of the party, or a privilege of the public, is a question that has been much discussed. On the one side it is argued that the welfare of society depends upon marital confidence being inviolable, and that consent of parties can no more do away with this inviolability, than the consent of parties can do away with the marriage tie.¹ The twain are legally made one flesh; consent cannot sever them and resolve them into independent parties. On the other side it is argued that even on the showing of those who set up this inviolability, it has its exceptions, for husbands and wives are permitted to testify on opposite sides of suits between strangers, and in all cases of personal violence, can testify against each other, which would not be permitted if the policy of the law regarded them as absolutely identical. It is further insisted that public justice is advanced by having all obtainable relevant evidence poured into a case, leaving credibility to be determined as a matter of fact; and though public justice may be required to yield in cases where by calling either husband or wife to testify the peace of a family may be destroyed; yet this is not necessary when the husband desires the examination of the wife, or the wife desires the examination of the husband, because by such consent the peace of the family is promoted. Hence it is that Best, C. J., once permitted the examination of a wife when the husband consented,² though his conclusion has been subsequently questioned, and is still open to doubt.³ In England, by the act 16 & 17 Vict., husbands and wives of parties are made competent witnesses in such cases.⁴

¹ See *Barker v. Dixie*, Cas. temp. Hardw. 260; *Colbern's case*, 1 Wheel. C. C. 479.

² *Pedley v. Wellesley*, 3 C. & P. 558.

³ *Barbat v. Allen*, 7 Ex. R. 109.

⁴ *Taylor's Evidence*, § 1219 A. In *Barbat v. Allen*, supra, the defendant had called his wife as a witness, but the judge at nisi prius had rejected her testimony on objection taken. [This was before the passing of the Act 16 & 17 Vict. c. 83.] The plaintiff

afterwards offered to waive the objection, but the judge refused to receive the waiver. Under these circumstances, the learned barons, without deciding the question whether the witness could be thus examined by consent, were contented to hold that it was at least discretionary with the judge, whether he would allow the objection to be withdrawn, and he having refused to do so, declined to interfere. *Barbat v. Allen*, 7 Ex. R. 609.

§ 429. Where the relationship has ceased by death,¹ or by divorce,² the wife may be admitted for or against the former husband or his representatives (or the converse), though she is precluded from testifying as to information derived confidentially during marital intercourse.³

Effect on
admissi-
bility of
death or
divorce.

§ 430. The reason for the exclusion of husband and wife, when called for or against the other, being social policy, and not interest, statutes abolishing incompetency resting on interest do not remove the common law incompetency of husband and wife for or against the other.⁴ This is eminently the case in respect, as will pres-

General
statutes
removing
disabilities
do not
touch this.

¹ *Doker v. Hasler*, R. & M. 198; *Dexter v. Booth*, 2 Allen, 559; *Baxter v. Knowles*, 12 Allen, 114; *Dobson v. Racey*, 8 N. Y. 216; *Gebhart v. Shindle*, 15 S. & R. 237; *Thomas v. Maddan*, 50 Penn. St. 261; *Wallis v. Britton*, 1 Har. & J. 478; *Morris v. Harris*, 9 Gill, 19; *William & Mary College v. Powell*, 12 Grat. 372; *Stober v. McCarter*, 4 Oh. St. 513; *Woolley v. Turner*, 13 Ind. 253; *Haugh v. Blythe*, 20 Ind. 24; *Shaffer v. Richardson*, 27 Ind. 122; *Mercer v. Patterson*, 41 Ind. 440; *Tracy v. Kelley*, 52 Ind. 535; *Lockwood v. Mills*, 39 Ill. 602; *Pratt v. Delavan*, 17 Iowa, 307; *McGuire v. Maloney*, 1 B. Mon. 224; *English v. Cropper*, 8 Bush, 292; *Price v. Joyner*, 3 Hawkes, 418; *Gaskill v. King*, 12 Ired. L. 211; *Moseley v. Eakin*, 15 Rich. (S. C.) 324; *Hay v. Hay*, 3 Rich. (S. C.) Eq. 384; *Saunders v. Hendrix*, 5 Ala. 224; *Stuhlmüller v. Ewing*, 39 Miss. 447; *Sherwood v. Hill*, 25 Mo. 391; *Keys v. Baldwin*, 33 Tex. 666. In Illinois the common law disability remains unaffected by statute. *Reeves v. Herr*, 59 Ill. 81. By statute in Massachusetts, the widow is a witness for the administrator, though not as to confidential communications. *Robinson v. Talmadge*, 97 Mass. 171. As to New Hampshire statute, see *Winship v. Enfield*, 42 N. H. 197.

Barnes v. Camaek, 1 Barbour, 392; *Ratcliff v. Wales*, 1 Hill, 63; *Cook v. Grange*, 18 Ohio, 526; *State v. Dudley*, 7 Wise. 664; *Crook v. Henry*, 25 Wise. 569; *Herrick v. Odell*, 29 Mich. 47; *Anderson v. Anderson*, 9 Kans. 112.

³ *Monroe v. Twistleton*, Peake's Ev. Ap. 39; *Doker v. Hasler*, R. & M. 198; *Avison v. Kinnaird*, 6 East, 192; *Stein v. Bowman*, 13 Peters, 209; *Ryan v. Follansbee*, 47 N. H. 100; *Coffin v. Jones*, 13 Pick. 444; *Williams v. Baldwin*, 7 Vt. 503; *State v. Phelps*, 2 Tyler, 374; *Gray v. Cole*, 5 Harr. (Del.) 418; *Wells v. Tucker*, 3 Binn. 366; *Cornell v. Vanartsdalen*, 4 Penn. St. 364; *Griffin v. Smith*, 45 Ind. 366; *Spradling v. Conway*, 51 Mo. 51; *State v. Jolly*, 3 D. & Bat. 110; *Lingo v. State*, 29 Ga. 470; *Brewer v. Ferguson*, 11 Humph. 565.

⁴ *Lucas v. Brooks*, 18 Wall. 436; *McKeen v. Frost*, 46 Me. 239; *Young v. Gilman*, 46 N. H. 481; *Cram v. Cram*, 23 Vt. 15; *Lunay v. Vantyne*, 40 Vt. 501; *Kelly v. Drew*, 12 Allen, 107; *Drew v. Tarbell*, 117 Mass. 90; *Symonds v. Peck*, 10 How. (N. Y.) Pr. 395; *Rich v. Husson*, 4 Sandf. 115; *Mitchinson v. Cross*, 58 Ill. 366; *Bevins v. Cline*, 21 Ind. 37; *Pea v. Pea*, 35 Ind. 387; *Stanley v. Stanton*, 36 Ind. 445; *Costello v. Costello*, 41 Ga. 613; *Dunlap v. Hearn*, 37 Miss.

ently be seen, to the confidential communications to each other of husband and wife.¹

§ 431. Under special statutes, husband and wife, in several jurisdictions, have been made competent witnesses in suits affecting each other.² These statutes, it may be generally remarked, in conferring competency, do not preclude the parties from taking advantage of the right of withholding privileged communications which occurred during coverture and not in the presence of third parties;³ nor do they strip the parties of the right to decline to answer criminating questions.⁴ Privilege, as it exists at common law, can be asserted in all cases in which it is not specifically prohibited by statute.⁵

471 (though see *Lockhart v. Luker*, 36 Miss. 68); *Funk v. Dillon*, 21 Mo. 294; *Birdsall v. Dunn*, 16 Wisc. 235; *Hobby v. Wisconsin Bk.* 17 Wisc. 167. See *infra*, § 478.

¹ See *infra*, § 478.

² *Packet Co. v. Clough*, 20 Wall. 528; *State v. Black*, 63 Me. 210; *Burke v. Savage*, 13 Allen, 408; *Merriam v. R. R.* 20 Conn. 354; *Southwick v. Southwick*, 49 N. Y. 510; *Marsh v. Potter*, 30 Barb. 506; *Bronson v. Bronson*, 8 Phila. R. 261; *Delinger's Appeal*, 71 Penn. St. 425; *Robinson v. Chadwick*, 22 Oh. St. 527; *Menk v. Steinfert*, 39 Wisc. 370; *Bennifield v. Ilypres*, 38 Ind. 498; *McNail v. Ziegler*, 68 Ill. 224; *State v. Nash*, 10 Iowa, 81; *Ruth v. Ford*, 9 Kans. 17; *Furrow v. Chapin*, 13 Kans. 107; *Bradsher v. Brooks*, 71 N. C. 322; *Chesley v. Chesley*, 54 Mo. 347; *Evers v. Ins. Co.* 59 Mo. 429.

³ *McKeen v. Frost*, 46 Me. 239; *Jones v. Simpson*, 59 Me. 180; *Young v. Gilman*, 46 N. H. 484; *Dexter v. Booth*, 2 Allen, 559; *Burke v. Savage*, 13 Allen, 408; *Bliss v. Franklin*, 13 Allen, 244; *Packard v. Reynolds*, 100 Mass. 153; *Baxter v. R. R.* 102 Mass. 385; *Raynes v. Bennett*, 114 Mass. 424; *Drew v. Tarbell*, 117 Mass. 90;

People v. Reagle, 60 Barb. 527; *Southwick v. Southwick*, 49 N. Y. 513; *Wehrkamp v. Willett*, 4 Abb. (N. Y.) App. 548; *Westerman v. Westerman*, 25 Oh. St. 500; *Bevins v. Cline*, 21 Ind. 371; *Thomas v. Barbour*, 49 Ill. 370; *Mitchinson v. Cross*, 58 Ill. 366; *Reeves v. Herr*, 59 Ill. 81; *Jackson v. Jackson*, 40 Ga. 157; *Costello v. Costello*, 41 Ga. 613; *Buck v. Ashbrook*, 51 Mo. 539; *Moore v. Wingate*, 53 Mo. 398; *Magness v. Walker*, 26 Ark. 470; *Creamer v. State*, 34 Tex. 173; *State v. McCord*, 8 Kans. 232.

⁴ *Bronson v. Bronson*, 8 Phila. R. 261.

⁵ The statutes bearing on marital incompetency are so numerous and various as to defy analysis. The following, however, may be taken as illustrations:—

In New Hampshire the statutes are thus recapitulated:—

“In *State v. Moulton*, 48 N. H. 485, it was expressly held that the recent statutes, making the wife a witness for her husband, do not apply in criminal cases. A different rule is now established by the following statute, P. L. 1871, c. 38, § 2: ‘In any case where the respondent in any

§ 432. If it were held that a husband could not be permitted to contradict his wife, or a wife her husband, not only would a part of the truth be kept out of the case, but an unfair advantage would be given to the party who has the fortuitous advantage of priority in call. By this

Husband and wife may be admitted to contradict each other.

criminal prosecution is allowed to testify by law, the wife of such respondent shall be a competent witness.' Sec. 3. 'This act shall apply to all cases now pending, and shall take effect upon its passage.' Approved July 13, 1871.

"In civil cases, under the provisions of § 22, of c. 209, Gen. Sts. (as amended by P. L. 1869, c. 29, and P. L. 1870, c. 20), the wife may testify for or against her husband, and the husband for or against the wife, in any case, when it appears to the court that their examination as witnesses upon the points to which their testimony is offered would not lead to a violation of marital confidence; and in the trial of any civil suit or proceeding in which a husband or wife is competent, or shall be admitted to testify as witnesses for or against each other on one side of a case, the same right shall exist on the opposite side of the case. Besides these general provisions, applicable to all cases alike, the husband and wife are by statute (Gen. Sts. c. 209, §§ 20, 21) made witnesses for or against each other, whether joined as parties or not, in the following cases: 1st. In actions upon insurance policies, so far as relates to the amount and value of the property insured. 2d. In suits against common carriers, so far as relates to the loss, amount, and value of the property in question. 3d. In actions on matter arising before marriage. 4th. In suits for personal injuries to the wife, or for damages to the husband on that account." State v. Straw, 50 N. H. 460, Ladd, J.

In Massachusetts, by St. 1865, the wife may be a witness as to contracts made in her husband's absence. This, however, does not relieve disability except in the business transactions conducted by the wife in such absence. *Baxter v. R. R.* 102 Mass. 385.

"The facts alleged did not make the plaintiff's wife a competent witness. She was offered because it was alleged that she was the only person who saw and knew the facts attending the escape of the plaintiff's cow from his lot. By the St. of 1865, c. 207, § 2, she may be a witness whenever the contract or cause of action in issue and on trial was made or transacted with her in the absence of her husband. She was rightly excluded, because the terms of the statute did not include such a case as this. *Bliss v. Franklin*, 13 Allen, 211." Chapman, C. J., *Baxter v. R. R.* 102 Mass. 385.

Under the Illinois statute husband and wife are not competent witnesses against each other, though in certain cases they may be examined in each other's behalf. *Hawver v. Hawver*, 78 Ill. 412; *Trepp v. Barker*, 78 Ill. 146; *Primmer v. Clabaugh*, 78 Ill. 94.

In New York, under the provisions of the Act of 1867 (c. 887, Laws of 1867), in an action between husband and wife, either is a witness in his or her behalf, against the other, save in the cases excepted in the act. The act, it is held, applies to all trials thereafter had in actions pending when it took effect, and under it the

accident it would be determined whether the husband's version or the wife's should be received. Whoever would happen to

husband or wife can testify to conversations and communications (not confidential) had with the other prior to the taking effect of the act. *Southwick v. Southwick*, 49 N. Y. 510.

"This statute," says Folger, J., giving the judgment of the court, "seems to be the complement in this respect of those sections of the Code, and, as they were intended to remove the disqualification of being a party, so this is to remove the disqualification of being a husband or wife, so that, under the Code and this act as one, there may be neither the disqualification of being a party, nor that of being a married person. And it was admitted in many of these decisions, that the letter of the sections of the Code extended to, and clearly embraced, married persons, when they were parties. *Wehrkamp v. Willett*, 1 Keyes, 250; *Smith v. Smith*, 15 Harr. Pr. R. 165. But the courts, venerating the common law rule, which prevented married persons being witnesses for or against each other, save in very exceptional cases, deemed it requisite that the legislature should, more explicitly than it had done in those sections, express an intention to abrogate that rule, before the judiciary should declare that it was broken. The decisions were put, not upon the lack of literal force in the statute, but in a reluctance to find in the words the intent to invade a rule so ancient and so thoroughly founded. It will be perceived that in the Act of 1867 there is the same, if not greater, literal force than in the Code; while at the same time it must be conceded that by it, at the narrowest view of it, the common law rule is, beyond dispute, seriously impaired. The reason of that rule was because of an identity of interest in husband

and wife, wherefore they might not be witnesses for each other; and because of the closeness of the marriage relation and its mutual and unrestrained confidences, wherefore it was against public policy that they should be witnesses against each other, for that it tended to implacable quarrels and divisions. But the reason is ignored when a wife may be called by a stranger as a witness against her husband, or by her husband against a stranger, as much as when, being a party against her husband, she is sworn in her own behalf, or is called by him to his advantage.

"Then as to the intent of the act. So far we have noticed only the first section of the act. If it be thought—and it seems to have been so thought by a learned court—that the language of the first section does not fully convey an intent of the legislature to permit a husband or a wife to become a witness in an action in which they are opposing parties (*Minier v. Minier*, 4 Lansing, 421), it will be found, I think, that the second and third sections disclose that intention more completely." Folger, J., *Southwick v. Southwick*, 49 N. Y. 513.

The Code, § 1710, cl. 7, is as follows :—

"A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage, or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage. But this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for

be called first would preclude the other from being examined. Hence either party to the marriage relation is permitted to con-

a crime committed by one against the other."

In *Tilton v. Beecher* (Abbott's Rep. ii. 48 *et seq.*), Mr. Tilton, the plaintiff (the suit being against Mr. Beecher for damages for criminal conversation with the plaintiff's wife), was offered as a witness to prove his wife's adultery. This was objected to by the defendant's counsel, who, after citing a series of common law authorities, relied on *Chamberlain v. People*, 23 N. Y. 88; *Dann v. Kingdom*, 1 N. Y. Sup. Ct. 492; *Lucas v. Brooks*, 18 Wall. 452; *Rideout's Trusts*, L. R. 10 Eq. 44. In behalf of the plaintiff it was argued that his competency, for this purpose, was established by the statute of 1867. To this effect were cited: *Potter v. Marsh*, 30 Barb. 506; *S. C.* 24 How. Pr. 610, note; *Wehrkamp v. Willett*, 4 Abb. App. 548, 559; *Potter v. Chamberlain*, 23 N. Y. 85; *White v. Stafford*, 35 Barb. 419; *Card v. Card*, 39 N. Y. 317; *Matteson v. R. R.* 62 Barb. 364; *S. C.* 35 N. Y. 487; *Petrie v. Howe*, 4 N. Y. Sup. Ct. 85. The court (p. 116) held that the plaintiff was entitled to testify as a witness, but not as to confidential communications from his wife.

In *Dickerman v. Graves*, 6 Cush. 308, a wife, *after a divorce* from her husband, was held a competent witness for him to prove the fact of adultery in a suit by him against the alleged adulterer.

In Pennsylvania, under the Act of April 15, 1869, a wife may be called by her husband as a witness, notwithstanding she may be compelled, on cross-examination, to give evidence against him; the act provides for the competency of the witness, not for the effect of her testimony. *Ballantine v. White*, 77 Penn. St. 20.

"The third assignment of error is that the court erred in allowing the wife of the plaintiff to testify for him. But the language of the Act of April 15, 1869, is very explicit, that neither interest nor policy of law shall exclude a party or person from being a witness in any civil proceeding. And the proviso only excepts the case of husband and wife testifying against each other. It is argued, as I understand, that, as the wife must be subjected to cross-examination, she may thereby be compelled to give testimony against her husband. But so may her testimony in chief be when offered in behalf of her husband. He may have utterly misapprehended the effect of it, or, indeed, may have been mistaken as to what it would be. The act is providing for the competency of the witness for the party for whom she is offered, not as to the effect of the testimony. She is offered by her husband on his behalf. When admitted, as by the act she must be, her husband must take all the risks of what her evidence will be, whether upon examination in chief or cross-examination." *Sharswood, J.*, *Balentine v. White*, 77 Penn. St. 25.

In the same state, in an action against husband and wife on a mortgage of the wife's property, where she died before trial, and her administrator was substituted of record, the judge excluded the plaintiff as a witness, but permitted the husband to testify. It was held by the supreme court that the husband also should have been excluded. *Crouse v. Staley*, 3 Weekly Notes, 83.

In Ohio, under the amendatory Act of April 18, 1870 (*57 Ohio L.* 413), husband and wife are competent witnesses for and against each other, ex-

tradict, even to the extent of discrediting, the other party when the two are examined in one case.¹ Whether either husband or wife can be permitted, in a collateral procedure, to charge the other with a criminal offence, has been doubted. In England, it was at one time held that no such testimony could be received,² and so has it frequently been ruled in this country.³ But it is more reasonable to admit such testimony in all cases where it cannot be used as an instrument of future prosecution, provided the witness be not compelled to testify.⁴

§ 433. It has been said that adultery in a divorce suit must be proved beyond reasonable doubt.⁵ But this conflicts with the conclusions hereafter reached,⁶ and would produce much confusion in cases in which adultery is charged on both sides.⁷ But it is only with reluctance

In divorce cases testimony to be carefully weighed.

cept as to communications made by one to the other, and acts done by one in the presence of the other during coverture, and not in the known presence of a third person.

The act is held to be applicable to cases pending and causes of action existing at the time of its passage, notwithstanding the provisions of the Act of February 19, 1866 (S. & S. 1), declaring the effect of repeals and amendments.

It has been further ruled that evidence that a third person was present, and known to be present, at the time of making such communications, or doing such acts, is for the court and not for the jury, and, on error, will be presumed to have been given to the court, unless the contrary appears. *Westerman v. Westerman*, 25 Ohio St. 500.

¹ *Supra*, § 425; *Stapleton v. Crofts*, 18 Q. B. 368; *Annesley v. Anglesea*, 17 How. St. Tr. 1276; *R. v. All Saints*, 6 M. & S. 194; *R. v. Bathwick*, 2 B. & A. 639; *Stein v. Bowman*, 13 Pet. 209; *State v. Marwin*, 35 N. H. 22; *Fitch v. Hill*, 11 Mass. 286; *Roy. Ins. Co. v. Noble*, 5 Abb. Pr. (N. S.) 55; *Ware v. State*, 35 N. J. 553; *State v. Dudley*, 7 Wise. 664. See,

however, *contra*, *Roach v. State*, 41 Tex. 261; *Keaton v. McGwier*, 24 Ga. 217.

² *R. v. Clivinger*, 2 Durn. & East, 263.

³ *State v. Welsh*, 26 Me. 30; *Com. v. Sparks*, 7 Allen, 534; *State v. Gardner*, 1 Root, 485; *State v. Wilson*, 31 N. J. 77; *State v. Pettaway*, 3 Hawks, 623; *People v. Horton*, 4 Mich. 87. See *R. v. Williams*, 8 C. & P. 289.

⁴ *R. v. Bathwick*, 2 B. & Ad. 639; *R. v. All Saints*, 6 M. & S. 194; *R. v. Halliday*, 8 Cox, 298; *State v. Briggs*, 9 R. I. 361; *Petrie v. Howe*, 4 N. Y. Sup. Ct. 85; *Tilton v. Beecher*, Abbott's Rep. ii. 116. See *Phillipp's Ev.* i. 84 (4th Am. ed); *Com. v. Reid*, 8 Phil. R. 609; *State v. Dudley*, 7 Wise. 664. See *supra*, § 425.

⁵ *Berekmans v. Berekmans*, 2 C. E. Green, 453.

⁶ See *infra*, § 1245; and see *Bishop Mar. & Div.* § 278.

⁷ See *supra*, § 414; *Foss v. Foss*, 12 Allen, 26; *Thayer v. Thayer*, 101 Mass. 111; *Anable v. Anable*, 24 How. (N. Y.) Pr. 92; *Van Cort v. Van Cort*, 4 Edw. (N. Y.) 621; *Rivenburgh v. Rivenburgh*, 47 Barb. 419;

that courts will grant divorces on the testimony of the parties; and at least some corroborative proof will be required when the nature of the case permits.¹ It should also be remembered that a proceeding for divorce is in many respects a criminal procedure; and that it is open to grave question whether, as such, either husband or wife is admissible to prove each other's adultery, in those states where adultery is a criminal offence.² As to *non-access*, the question of privilege will be hereafter discussed.³

VI. DISTINCTIVE RULES AS TO EXPERTS.

§ 434. An expert has been defined to be a witness who testifies as to conclusions from facts, while an ordinary witness testifies only as to facts. This definition, however, is not sufficiently exact. Few witnesses, called to detail facts, reproduce such facts as they really exist. Apart from the psychological question, whether what we see is perceived or is inferred by us, most acts as to which we testify are necessarily inferred, not actually witnessed.⁴ I hear the report of a gun, for instance; I notice that the gun is aimed at a particular bird by a sportsman, and I see the bird fall; I infer that the sportsman killed the bird, though I did not see the shot as it passed through the air and struck. Identity, in this view, is always a matter of inference. Many witnesses, in the Tichborne cases, swore to the identity, many others to the non-identity, of the claimant with Roger Tichborne; but all, whether for or against such identity, showed, on their examination, that what they swore to was not a fact, but a conclusion from facts. We must therefore penetrate further if we seek to distinguish between the expert and the non-expert. And the true distinction is this:

Expert is entitled to testify as a specialist.

Lincoln v. Lincoln, 6 Robt. (N. Y.) 525; *Mayer v. Mayer*, 21 N. J. Eq. 251; *Winter v. Winter*, 7 Phila. R. 369; *Bronson v. Bronson*, 8 Phil. R. 261. As to proof of adultery in divorce cases, see particularly *infra*, § 483.

¹ See cases just cited; and see, also, *U. v. J.*, L. R. 1 P. & M. 469; *T. v. D.*, L. R. 1 P. & M. 127; *Scott v. Scott*, 3 Sw. & Tr. 319; *Hart v. Hart*, 3 Spinks, 196; *Robbins v. Rob-*

bins, 100 Mass. 150; *Thayer v. Thayer*, 101 Mass. 141; *Stevenson v. Stevenson*, 7 Phil. 386; *Bronson v. Bronson*, 8 Phil. R. 261; *Tate v. Tate*, 26 N. J. Eq. 55; *Black v. Black*, *Ibid.* 431; *Hays v. Hays*, 19 Wise. 182; *Fugate v. Pierce*, 19 Mo. 146.

² *Supra*, § 432; *Fausset v. Faussett*, 7 Notes of Ecc. Cases, 72; *King v. King*, 2 Robt. Ecc. 153.

³ *Infra*, § 608.

⁴ See *supra*, § 15.

that the non-expert testifies as to conclusions which may be verified by the adjudicating tribunal; the expert to conclusions which cannot be so verified. The non-expert gives the results of a process of reasoning familiar to every day life; the expert gives the results of a process of reasoning which can be mastered only by special scientists.¹

§ 435. We have already seen that foreign laws are to be proved by experts.² The same right may be extended to laws as to which the *judex fori* cannot be familiar without proof. Thus it has been held, that the opinion of experienced military officers may be taken as to a point of military practice.³ So in an action for libel arising out of a race-horse transaction, it was held by Lord Denman, that a member of the jockey club might be asked, as a witness, whether he did not consider a certain course of conduct to be dishonorable.⁴ If a disputed question of navigation, to

Specialists may be examined as to laws other than the *lex fori*.

¹ See Strippelmann, *die Sachverständigen*, Kassel, 1858; Endemann, 241. When the examination testified to may be made alike by specialist and layman (*e. g.* opinion whether fresh stains are blood), then the distinction between the two kinds of testimony is quantitative and not qualitative. *People v. Fernandez*, 35 N. Y. 49. See *infra*, § 436.

By the Roman law, experts (*artisperiti*) could be called by the *judex*, at his own discretion (when not already called by the parties), in order to acquaint himself with physical laws or phenomena of which he was not personally cognizant. See L. 8, § 1, x. 1; L. 3, § 4, xi. 6; L. 3, Cod. fin. reg. iii. 39. See Endemann, 243. The canon law appears to have adopted the same practice. See Strippelmann, § 7.

The Italian glossarists, in carrying out their maxim that the court is to determine solely *secundum allegata et probata*, limited the right of the judge to introduce, to extend his information as to the case, those who *de peritia artis examinantur*. This right he

could only exercise when necessary to supplement the action of the parties. Each party, by this system, calls experts in the first instance; the value of expert testimony being based on the rule that *medico artifici, etc., unicuique in sua arte credendum est*. Durant, I. c. But it is in the power of the court to limit the number of experts, and even to select two or three from those proposed by the parties, excluding the others. Bartol. in L. 1, pr. de ventr. insp. No. 5; Bald. in L. 20, Cod. de fide inst. The rule is for the expert to be sworn, though only *de credulitate*. Masc. I. c.; Menoch. de arb. jud. ii. 114, No. 28; Endemann, 244.

An expert may not only say that he formed an opinion, but that he acted upon that opinion, and his acting upon it is a strong corroboration of its truth. *Stephenson v. River Tyne Commissioners*, 17 W. R. 590.

² *Supra*, § 305.

³ *Bradley v. Arthur*, 4 B. & C. 295.

⁴ *Greville v. Chapman*, 5 Q. B. 731.

take another illustration, should arise, experts may be examined to prove a general maritime usage, supplementary to and not conflicting with the law of which the court takes judicial notice.¹ But as to laws of which the courts take judicial notice, experts cannot be examined.²

§ 436. We will elsewhere see,³ that ordinarily a witness cannot give his conclusions from facts, but must state the facts, leaving the drawing of conclusions to the court and jury. The same rule applies to experts, in all matters as to which the lay mind is capable of forming a conclusion; and as to all matters of free logical inference from scientific facts.⁴ Thus an expert cannot be asked whether a railroad train stopped time enough for the passengers to get off, or whether it is safer to discharge passengers at a station or before reaching it,⁵ or whether it was prudent to blow a steam-whistle at a particular time.⁶ So a practising physician cannot be examined as to the amount of damages resulting to one physician from the violation of a contract by another not to practise in a particular district.⁷ So a farmer cannot be examined as to the sufficiency of bars to restrain cattle;⁸ nor can a person conversant with real estate be asked as to the peculiar liability of unoccupied buildings to fire.⁹ So a physician cannot

On matters non-professional or of common observation, experts cannot give opinions.

¹ *City of Washington*, 98 U. S. (2 Otto) 31.

² *The Clement*, 2 Curt. 363.

³ *Infra*, § 509.

⁴ *Winans v. R. R.* 21 How. 88; *Concord R. R. v. Greely*, 23 N. H. 237; *Page v. Parker*, 40 N. H. 47; *Perkins v. Ins. Co.* 10 Gray, 312; *Boston v. R. R.* 3 Allen, 142; *Hovey v. Sawyer*, 5 Allen, 554; *White v. Ballou*, 8 Allen, 408; *Luce v. Ins. Co.* 105 Mass. 299; *Higgins v. Dewey*, 107 Mass. 494; *People v. Bodine*, 1 Denio, 281; *Bristol v. Tracy*, 21 Barb. 236; *Kennedy v. People*, 5 Abbott (N. S.), 147; *Wilson v. People*, 2 Parker C. R. 619; *Rawls v. Ins. Co.* 36 Barb. 357; 27 N. Y. 282; *Cook v. State*, 4 Zab. 813; *Moore v. State*, 17 Oh. St. 521; *Linn v. Sigsbee*, 67 Ill. 75; *Chicago R. R. v. Moffitt*, 75 Ill. 524; *Chicago v.*

McGiven, 78 Ill. 347; *Hopkins v. R. R.* 78 Ill. 32; *Pelamourges v. Clark*, 9 Iowa, 1; *Bills v. Ottumwa*, 35 Iowa, 107; *Hamilton v. R. R.* 36 Iowa, 81; *Muldowney v. R. R.* 39 Iowa, 615; *Newmark v. Ins. Co.* 30 Mo. 160; *Rosenheim v. Ins. Co.* 33 Mo. 230. See *Com. v. Piper*, 120 Mass. 185.

⁵ *Keller v. R. R.* 2 Abb. (N. Y.) App. 480.

⁶ *Hill v. R. R.* 55 Me. 438.

⁷ *Linn v. Sigsbee*, 67 Ill. 75.

⁸ *Enright v. R. R.* 33 Cal. 230.

⁹ *Muloy v. Ins. Co.* 2 Gray, 541. See *Lyman v. Ins. Co.* 14 Allen, 329.

In *Campbell v. Richards*, 5 B. & Ad. 846, Lord Denman, C. J., said: "Witnesses conversant in a particular trade may be allowed to speak to a prevailing practice in that trade; scientific persons may give their opin-

be asked as an expert whether a rape could have been committed in a particular way, when the question is one which it required no professional knowledge to answer;¹ nor as to the effect on the health of an habitual use of intoxicating liquor.² So it has been held, that the course which the owner of a damaged steamer ought, as a prudent man, to take as to laying up for examination and repairs on discovering defects in the engine which had been put into her under such a contract, is not a question of science calling for the opinion of an expert.³ So in an action for injuries to plaintiff caused by the upsetting of defendants' stage-coach in which plaintiff was a passenger, where a witness for the plaintiff was asked, on his direct examination, to "state, if he knew, from his knowledge of the condition of the road at that time, what would be the chance for a stage-coach to tip up, being driven by an ordinarily careful, prudent driver;" it was held that the question was inadmissible, as calling for the witness's opinion as to a matter not involving professional skill, and concerning which the jury were to judge for themselves from the facts in evidence.⁴

ions on matters of science; but witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced if the parties had acted in one way rather than in another. In the great case of *Carter v. Boehm*, a broker, who was called as a witness for the plaintiff, stated on cross-examination, that in his opinion certain letters ought to have been disclosed, and that if they had, the policy would not have been underwritten; the jury, however, found, against the witness's opinion, a verdict for the plaintiff. When his opinion was pressed, as a ground for a new trial, Lord Mansfield, in the name of the whole court, declared that the jury ought not to pay the least regard to it, because it was mere opinion and not evidence. The same doctrine is laid down in a case of *Durrell v. Berderly*, by Gibbs, C. J., though he re-

ceived the evidence on great pressure. He said: "The opinion of the underwriters on the materiality of facts and the effect they would have had upon the premium is not admissible in evidence. Lord Mansfield and Lord Kenyon discountenanced this evidence of opinion, and I think it ought not to be received. It is the province of a jury, and not of individual underwriters, to decide that facts ought to be communicated. It is not a question of science, in which scientific men will mostly think alike, but a question of opinion, liable to be governed by fancy, and in which the diversity might be endless. Such evidence leads to nothing satisfactory, and ought to be rejected." *Powell's Evidence*, 4th ed. 103.

¹ *Cook v. State*, 24 N. J. L. 843.

² *Rawls v. Ins. Co.* 27 N. Y. 282.

³ *Clark v. Detroit*, 32 Mich. 348.

⁴ *Oleson v. Tolford*, 37 Wisc. 327.

§ 437. We have seen that where conclusions depend upon facts whose evidential weight can only be determined by those familiar with a particular specialty, then these conclusions may be given by experts in such specialty. But who is to decide as to what knowledge is special and what is ordinary, — as to whether the conclusion is one a layman may safely reach, or one which must be reserved for an expert? Necessarily the line in this respect must be laid down by the *judex fori*. Where it is to be laid must depend, to some extent, upon the degree with which the jury and judge may be familiar with the specialty, which of course depends upon varying conditions. Even where the conditions are in a measure constant, the courts have found it difficult to reach a consistent rule as to certain specialties. Thus sometimes we are told that the comparison of hands is to be left to experts, sometimes to juries.¹ In England, the queen's bench has determined that insurance brokers cannot give their opinions as to the degree of diligence requisite in obeying instructions as to policies,² while the common pleas has virtually ruled the contrary.³ In this country, the practice is to confine experts, as such, to opinions connected with their specialty.⁴ Whether, as to the particular question, the witness is an expert, the court is to determine, and on this point the witness may be examined, and evidence may be received *aliunde*.⁵

Whether or no conclusion belongs to a specialty is for the court.

¹ See *infra*, §§ 712, 720.

² *Campbell v. Rickards*, 5 B. & Ad. 840.

³ *Chapman v. Walton*, 10 Bing. 57.

⁴ See § 336.

⁵ *Davis v. State*, 38 Md. 15; *Tome v. R. R.* 39 Md. 36; *Mendum v. Com.* 6 Rand. 704; *Bills v. Ottumwa*, 35 Iowa, 107; *Brabbits v. R. R.* 38 Wis. 290; *Caleb v. State*, 39 Miss. 721. *Infra*, §§ 666-721.

"The first three assignments of error relate to the admission of the opinion of witnesses produced as experts. It is objected that they were not first shown to be such. This is a preliminary question to be determined by the court in the first instance. If

the court shall think they are *primâ facie* qualified, it will then be for the jury to decide whether any, and if any, what weight is to be given to their testimony. It is a matter very much within the discretion of the court below, and if it appears that the witnesses offered had any claim to the character of experts, the court will not reverse on the ground that their experience was not sufficiently special. The question in the case now before us related to the proper mode and time of changing the fastening of boats in a tow, when for any reason it became necessary. It cannot be said that those frequently on board of such boats, while being towed, and inter-

§ 438. Whether scientific works are independently admissible in evidence is elsewhere considered.¹ Even by those courts who have been most resolute in excluding such works when offered substantively, it is agreed that an expert may show that his views are sustained by standard authorities in his profession.² He cannot, however, be permitted to read, as independent proof, extracts from books in his department,³ though he may refresh his memory, when giving the conclusions arrived at in his specialty, by turning to standard

Expert
may be ex-
amined as
to scientific
authorities.

ested either as captains or owners, have not experience in such matters, though it may not be equal to those on board the tugs. Men who follow the water for a living are generally, I think, close observers; and this results from the monotony of their employment in general. Whenever anything unusual occurs they take accurate notice of it. Captains of boats in a tow stand at their helms all day, or lounge about the deck, with nothing to do or think about; hence they are likely to be keen observers of all the circumstances occurring in the course of a trip. Such men form their opinions from facts within their own experience, and not from theory or abstract reasoning. They come, therefore, even more properly within the definition of experts than men of mere science." *Sharswood, J., Delaware & Chesapeake Steam Towboat Co. v. Starrs*, 69 Penn. St. 41.

"It is next urged that the court erred in admitting the testimony of witnesses to prove that the obstructions on the bridge were of such a character as would be likely to frighten horses of ordinary gentleness. The witnesses stated that they had seen and knew the character of the obstructions, their size and appearance; that the witnesses, each, were accustomed to handling and driving horses, and knew their habits, &c., and that these obstructions were of such a char-

acter as would be likely to frighten horses of ordinary gentleness. We think this evidence was properly admitted. The nature, habits, and peculiarities of horses are not known to all men. Persons who are in the habit of handling and driving horses, from this experience learn their habits, nature, &c., and are therefore better able to state the probable conduct of a horse under a given state of circumstances, in which they have, in their experience, witnessed their conduct under similar circumstances, than persons having no experience whatever with horses. So in respect to the age of a horse, experienced persons are able to tell, from an examination of the mouth and other signs, how old the animal is, while inexperienced persons would be utterly unable to even approximate to the age of the animal. We are of opinion, therefore, that the case does not fall within the rule announced in *Mukdowney v. The Ill. Cen. R'y. Co.* 36 Iowa, 462, and that there was no error in the admission of evidence." *Miller, Ch. J., Moreland v. Mitchell County*, 40 Iowa, 394; *S. P., Clinton v. Howard*, 42 Conn. 295; and see *infra*, § 1295.

¹ See §§ 665-67.

² *Collier v. Simpson*, 5 C. & P. 73; *Cocks v. Purday*, 2 C. & K. 290.

³ *Washburn v. Cuddihy*, 8 Gray, 430; *Com. v. Sturtivant*, 117 Mass. 122.

works.¹ The witness, having cited scientific authorities, it has been held they may be put in evidence to discredit him.²

§ 439. Certainly a person having a mere vague superficial knowledge of a profession ought not to be permitted to lay down its laws. To entitle him to answer questions as a professed expert, he must, in the opinion of the court, have special practical acquaintance with the immediate line of inquiry.³ Yet he need not be thoroughly acquainted with the *differentia* of the specific specialty under consideration.⁴ If this were necessary, few experts could be admitted to testify; certainly no courts could be found capable of determining whether such experts were competent. A general knowledge of the department to which the specialty belongs would seem to be enough. Thus a physician, not an oculist, has been permitted to testify as to injuries of the eye;⁵ physicians, not veterinary surgeons, as to diseases of mules;⁶ other persons, not veterinary

An expert
must be
specially
skilled.

¹ See *infra*, §§ 665-67; *Darby v. L.* 95, 507; *Davis v. State*, 35 Ind. Ousley, 1 H. & N. 1; *Pierson v.* 496; *State v. Hinkle*, 6 Iowa, 380; *Hoag*, 47 Barb. 243; *Hornblower, C.* *State v. Reddick*, 7 Kans. 143; *Mincke J.*, in 1 Zab. 196; *Cory v. Silcox*, 6 Ind. 39; *Harvey v. State*, 40 Ind. 516; *Bowman v. Torr*, 3 Iowa, 571; *Ripon v. Bittel*, 30 Wis. 614; *Luning v. State*, 1 Chandl. (Wis.) 264; *State v. Terrell*, 12 Rich. (S. C.) 321; *Merkle v. State*, 37 Ala. 139. See *Melvin v. Easley*, 1 Jones (N. C.) L. 386.

² *Ripon v. Bittel*, 30 Wis. 614.

³ *Berry v. Reed*, 53 Me. 487; *Woods v. Allen*, 18 N. H. 28; *Boardman v. Woodman*, 47 N. H. 120; *State v. Ward*, 39 Vt. 225; *Com. v. Rich*, 14 Gray, 335; *Rich v. Jones*, 9 Cush. 329; *Rogers v. Ritter*, 12 Wall. 317; *Benkard v. Babcock*, 2 Robt. (N. Y.) 175; *Thomas v. Kenyon*, 1 Daly, 132; *Donaldson v. R. R.* 18 Iowa, 280; *Morissey v. People*, 11 Mich. 327; *Graves v. Moses*, 13 Minn. 335; *Weaver v. Alabama Co.* 35 Ala. 176; *Caleb v. State*, 39 Miss. 722. See, as giving a laxer view, *Dole v. Johnson*, 50 N. H. 452; *Castner v. Sliker*, 33 N. J.

L. 95, 507; *Davis v. State*, 35 Ind. 496; *State v. Hinkle*, 6 Iowa, 380; *State v. Reddick*, 7 Kans. 143; *Mincke v. Skinner*, 44 Mo. 92; *Wilson v. State*, 41 Tex. 320. And see this point discussed at large in *Whart. Cr. Law*, 7th ed. §§ 48-9; and see, also, *infra*, § 446.

⁴ *State v. Wood*, 53 N. H. 484; *Dole v. Johnson*, 50 N. H. 452; *Cook v. Castner*, 9 Cush. 266; *Shattuck v. Train*, 116 Mass. 296; *Roberts v. Johnson*, 58 N. Y. 613; *Consolidated Co. v. Cashow*, 41 Md. 59; *House v. Fort*, 4 Blackf. 293; *Washington v. Cole*, 6 Ala. 212; *Tullis v. Kidd*, 12 Ala. 648; *Spiva v. Stapleton*, 38 Ala. 171. But in *Emerson v. Lowell*, 6 Allen, 146, it was ruled that a physician who has had no experience of the effect on health of breathing illuminating gas, could not be examined as an expert as to such effects. *Emerson v. Lowell*, 6 Allen, 146.

⁵ *Castner v. Sliker*, 33 N. J. L. 95, 507.

⁶ *Horton v. Green*, 61 N. C. 64.

surgeons, as to diseases of animals;¹ a physician, not making insanity a specialty, as to whether a person he visits is insane;² a witness, not a chemist, as to whether certain stains are apparently blood;³ a witness, not a chemist, as to the effect of powder, found on the defendant, in removing ink-marks;⁴ a surveyor, who is a volunteer, not appointed by state or county, to the correctness of a plat;⁵ a person, not a surgeon, to prove that a death was caused by wounds;⁶ while a witness accustomed to the use of horses may give his opinion, based on experience and observation, as to whether certain obstacles on a road would cause an ordinarily gentle horse to shy.⁷

§ 440. We will hereafter notice,⁸ that witnesses are ordinarily not allowed to give opinions as to conclusions dependent upon facts which are not necessarily involved in such conclusions. An exception to this rule is recognized in the case of experts, who are entitled to give their opinions or judgments as to conclusions from facts within the range of their specialties, but too recondite to be properly comprehended and weighed by ordinary reasoners. It makes no difference as to what is the specialty with which the expert is conversant. If its laws are not familiar to the ordinary business man, they must be proved, and their application to the case in issue shown by an expert.⁹

§ 441. The most common illustration of the principle just stated is that of the physician or surgeon. The medical profession is a specialty of vast importance, which has absorbed masses of learning with which no lay

¹ Slater v. Wilcox, 57 Barb. 604; Johnson v. State, 1 Ala. Sel. Cas. 72.

² Hastings v. Rider, 100 Mass. 622.

³ People v. Gonzales, 35 N. Y. 49.

⁴ People v. Brotherton, 47 Cal. 388. See Farmer's Bk. v. Young, 36 Iowa, 45.

⁵ Mincke v. Skinner, 44 Mo. 92.

⁶ State v. Smith, 22 La. An. 468.

Where a witness has been questioned to bring out his skill as an expert, considerable latitude ought to be allowed on cross-examination to bring out the facts as to his competency to give evidence in that character; yet no definite limit can be prescribed as

a rule of law, but a large discretion must be left in the trial court. Andre v. Hardin, 32 Mich. 324.

⁷ Clinton v. Howard, 42 Conn. 295; S. P., Moreland v. Mitchell, 40 Iowa, 394, quoted supra, § 431.

⁸ Infra, § 509.

⁹ Webb v. R. R. 4 Myl. & Cr. 120; McFadden v. Murdock, Ir. R. 1 C. L. 211; Carter v. Boehm, 1 Smith's L. C. 401, note; Litchfield v. Taunton Co. 9 Allen, 181; Kershaw v. Wright, 115 Mass. 361; Matteson v. R. R. 62 Barb. 364; Shelton v. State, 34 Tex. 662, and cases hereafter cited.

mind could become familiar, and which is divided not merely into a series of distinct departments, each with its peculiar erudition and practice, but into rival schools, dealing with particular cases in modes divergent if not antagonistic. Jurisprudence does not say to either of these schools, "You are right and the others are wrong;" but it says to the members of each school, "You are bound to exercise the skill, and possess the preparation, usual to good practitioners of your particular order."¹ So jurisprudence does not say to a physician or surgeon called to testify whether a wound or a poison was fatal, "You must have a particular diploma, or belong to a particular professional school;" but it says, "If you have become familiar with such laws of your profession as bear upon this issue, then you can testify how the issue is affected by such laws."² Hence physicians generally are admissible to state the nature and effects of a disease;³ the conditions of gestation;⁴ the effects of particular poisons on the human system;⁵ the effects of a particular treatment;⁶ the likelihood that death could be produced by a particular disease,⁷ though they have not made such conditions a specialty.⁸ As to a specialty, however, entirely out of his line, a physician cannot be examined as an expert.⁹ So medical attendants, neither specialists nor family physicians, may be examined as to cases of insanity,¹⁰ though they may not be competent to answer questions as to hypothetical cases.¹¹ So a

¹ Wharton on Negligence, § 733; *Corsi v. Maretzek*, 4 E. D. Smith, 1.

² *Livingston's case*, 14 Grat. 592; *New OrL. Co. v. Allbritton*, 38 Miss. 242.

³ *Perkins v. R. R.* 44 N. H. 223; *State v. Powell*, 2 Halst. 244; *Vanauken, in re*, 10 N. J. Eq. 186; *Lush v. McDaniel*, 13 Ired. L. 485; *Parker v. Johnson*, 25 Ga. 576; *Hook v. Stovall*, 26 Ga. 704; *Bennett v. Fail*, 20 Ala. 605; *Roberts v. Fleming*, 31 Ala. 683; *Jones v. White*, 11 Humph. 268.

⁴ *State v. Smith*, 32 Me. 369; *Young v. Makepeace*, 103 Mass. 50.

⁵ *Stephens v. People*, 4 Parker C. R. 396.

⁶ *Barber v. Merriam*, 11 Allen, 322.

⁷ *State v. Smith*, 32 Me. 329; *Wendell v. Troy*, 39 Barb. 329; *Mattison v. R. R.* 62 Barb. 364; 35 N. Y. 487; *Anthony v. Smith*, 4 Bosw. 503; *Cahn v. Costa*, 15 La. An. 612; *Paty v. Martin*, 15 La. An. 620.

⁸ *Dole v. Johnson*, 50 N. H. 452; *Castner v. Sliker*, 33 N. J. L. 95, 507.

⁹ *Emerson v. Lowell*, 6 Allen, 146.

¹⁰ *Hastings v. Rider*, 100 Mass. 622; *Chandler v. Barrett*, 21 La. An. 58; *Davis v. State*, 35 Ind. 496; *State v. Reddick*, 7 Kans. 143.

¹¹ See fully *infra*, § 454; *Com. v. Rich*, 14 Gray, 335.

surgeon is admissible to prove the nature of a wound and its probable cause and effects,¹ though it has been held not admissible for a surgeon to give an opinion on merely speculative data.² A physician, not a veterinary surgeon, has been permitted to speak as to the diseases of animals.³

§ 442. We have already seen that foreign laws must be proved, as matters of fact, by experts.⁴ In other relations, lawyers are admissible for the purpose of proving the laws of their profession. On a question of fees, for instance, a lawyer is competent to prove the value of the services sued for.⁵ So, also, a lawyer is competent to prove the practice of the courts.⁶

§ 443. Scientists, also, in their particular specialties, are admissible to prove the laws of such specialties.⁷ Thus, ichthyologists may be examined as to the capacity of fish to surmount certain obstructions;⁸ botanists and specialists in wood, as to the relations of different kinds of woods;⁹ chemists and microscopists, as to whether certain stains are from blood,¹⁰ as to the effects of a particular poison,¹¹ as to the nature of ink stains,¹² and as to the quality of certain fertilizers;¹³ physicians, with a general, though not special knowledge of chemistry, as to whether a particular poison was found in the stomach of the deceased;¹⁴ and a college graduate, who has studied chemistry with a distinguished chemist, has taught chemistry

¹ Rowell v. Lowell, 11 Gray, 420; Linton v. Hurley, 14 Gray, 191; Com. v. Piper, 120 Mass. 186; Wilson v. People, 4 Parker C. R. 619; Gardiner v. People, 6 Parker C. R. 155; Rumsey v. People, 19 N. Y. 41; Fort v. Brown, 46 Barb. 366; Com. v. Lenox, 3 Brewst. 249; People v. Kerrains, 1 Thomp. & C. 333; Davis v. State, 38 Md. 15, 43; State v. Morphy, 33 Iowa, 270; Shelton v. State, 34 Tex. 662.

² Com. v. Piper, 120 Mass. 186; Hawks v. Charlemont, 110 Mass. 110; Kennedy v. People, 39 N. Y. 245.

³ Slater v. Wilcox, 57 Barb. 604. See Benson v. Griffin, 30 Ga. 106; Horton v. Green, 64 N. C. 64; Johnson v. State, 1 Ala. Sel. Ca. 72.

⁴ See §§ 300-302.

⁵ Covey v. Campbell, 52 Ind. 157; Allis v. Day, 14 Minn. 516. See Ottawa v. Parkinson, 14 Kans. 159.

⁶ Mowry v. Chase, 100 Mass. 79.

⁷ Page v. Parker, 40 N. H. 47.

⁸ Cottrill v. Myrick, 3 Fairf. 222.

⁹ Com. v. Choate, 105 Mass. 451.

¹⁰ State v. Knights, 43 Me. 11; People v. Gonzales, 35 N. Y. 49; Gaines v. Com. 50 Penn. St. 319. See Whart. on Homicide, § 683.

¹¹ Hartung v. Peeple, 4 Parker C. R. 319.

¹² Farmers' Bk. v. Young, 36 Iowa, 45.

¹³ Wilcox v. Hall, 53 Ga. 635.

¹⁴ State v. Hinkle, 6 Iowa, 380.

for five years, and is acquainted with gases, and with the composition of camphene, as to the safety of a camphene lamp.¹

§ 444. Nor is it necessary that a specialty, to enable one of its practitioners to be examined as an expert, should involve abstruse scientific conditions. A coal-heaver would be more familiar with the laws bearing on his handiwork than would be a person who was without such experience ; and hence a coal-heaver would be an admissible expert on questions as to whether certain coal was heaved negligently.² A stockman is more likely rightly to estimate the size of a herd of cattle than would an ordinary observer ; hence a stockman may be asked as to the number of stock of a particular brand running in a range ;³ and as to the weight of cattle raised by himself.⁴ So it has been held, that tailors may be examined as to whether a pocket could have been picked through a cut made by a pickpocket in a coat, when it appears that the coat had been mended subsequently to the examination ;⁵ master-builders, as to the damage done certain buildings ;⁶ journeymen carpenters, as to the safety of buildings ;⁷ ship-furnishing carpenters, as to the construction of berths ;⁸ mechanics who have worked on ships, as to the effect of certain repairs to a vessel ;⁹ well-diggers, as to the imperviousness to water of soil ;¹⁰ farmers, as to whether particular land requires draining in order to have crops,¹¹ and as to injury said to be received by cattle,¹² and as to the effect of disturbances and noises on grazing cattle ;¹³ gardeners, as to the damage sustained by a garden and nursery ;¹⁴ gas-fitters, as to the characteristics of gas-meters ;¹⁵ machinists, who were in cars at a particular accident, as to what threw the cars off the track ;¹⁶ tobacco dealers, as to the best mode of testing

And so of practitioners in a business specialty.

¹ *Bierce v. Stocking*, 11 Gray, 174.

⁹ *Sikes v. Paine*, 10 Ired. (N. C.)

² See, as giving a contrary view, *L. 280.*

Hamilton v. R. R. 36 Iowa, 81.

¹⁰ *Buffum v. Harris*, 5 R. I. 243.

³ *Albright v. Corley*, 40 Tex. 105.

¹¹ *Buffum v. Harris*, 5 R. I. 243.

⁴ *Carpenter v. Wait*, 11 Cush. 257.

¹² *Polk v. Coffin*, 9 Cal. 56.

⁵ *People v. Morrigan*, 29 Mich. 5.

¹³ *Balt. R. R. v. Thompson*, 10 Md. 76.

See *quere*.

⁶ *Tibbetts v. Haskins*, 16 Me. 283.

¹⁴ *Vandine v. Burpee*, 13 Mete. (Mass.) 288. See *Whitbeck v. R. R.*

⁷ *Moulton v. McOwen*, 103 Mass.

36 Barb. 644.

587.

¹⁵ *Downs v. Sprague*, 1 Abb. (N.

⁸ *Tinney v. Steamb. Co.* 5 Lansing,

Y.) App. Dec. 480.

507.

¹⁶ *Seaver v. R. R.* 14 Gray, 466.

tobacco ;¹ engravers, as to whether an impression was original or secondary ;² pilots, as to the nature of a particular danger of navigation with which they are familiar ;³ persons conversant with horses, as to whether certain obstructions would frighten horses ;⁴ mail-agents, who have been accustomed to travel for years constantly on the cars, as to the degree to which speed should be slackened on nearing a station ;⁵ brakesmen, as to the time required to stop a train ;⁶ engine-drivers, as to the possibility of avoiding a collision ;⁷ millers, as to the condition of a bolting cloth,⁸ and as to the working condition of a mill ;⁹ seamen, as to whether a certain mode of navigation is prudent, as to questions of collision and wreck,¹⁰ as to whether a ship has a full cargo,¹¹ as to the proper mode of stowing,¹² as to the effect of a particular leak,¹³ as to the proper mode of towing,¹⁴ and as to whether, when it was maintained that the length of the shaft of a steamer settled the boat by the stern, and caused the journals to heat and bind, the boat settled more than it ought to, or than was usual ;¹⁵ dairymen, as to the adulteration of milk ;¹⁶ practical firemen, as to what changes in a building would affect its exposure to fire ;¹⁷ masons, as to the length of time requisite to dry the walls of a house so as to make it fit for habitation,¹⁸ as to the proper measurement of masonry,¹⁹ and as to the strength of a wall ;²⁰ miners, as to the cause of cracking and settling of walls ;²¹ brick-makers, as to the

¹ *Atwater v. Clancy*, 107 Mass. 369.

² Per Lord Mansfield, in *Folkes v. Chadd*, 3 Dougl. 157. See *R. v. Williams*, 8 C. & P. 434.

³ *Hill v. Sturgeon*, 28 Mo. 323.

⁴ *Moreland v. Mitchell Co.* 40 Iowa, 394 ; *Clinton v. Howard*, 42 Conn. 295.

⁵ *Detroit R. R. v. Van Steinburg*, 17 Mich. 99.

⁶ *Mott v. R. R.* 8 Bosw. 345. See, *contra*, *Hamilton v. R. R.* 36 Iowa, 31 ; *Muldowney v. R. R.* 36 Iowa, 462.

⁷ *Bellefontaine R. R. v. Bailey*, 11 Oh. St. 333.

⁸ *Cooke v. England*, 27 Md. 14.

⁹ *Read v. Barker*, 30 N. J. L. 378.

¹⁰ *Fenwick v. Bell*, 1 C. & K. 312 ; *Lane v. Wilcox*, 55 Barb. 615.

¹¹ *Ogden v. Parsons*, 23 How. 167.

¹² *Price v. Powell*, 3 Comst. 322.

¹³ *Parsons v. Ins. Co.* 16 Gray, 463.

¹⁴ *Delaware St. Co. v. Starrs*, 69 Penn. St. 41.

¹⁵ *Campbell, J., Clark v. Detroit L. M. W.* 32 Mich. 348.

¹⁶ *Lane v. Wilcox*, 55 Barb. 615.

¹⁷ *Schenck v. Ins. Co.* 24 N. J. L. 343.

¹⁸ *Smith v. Gugerty*, 4 Barb. 619.

¹⁹ *Schulte v. Hennessy*, 40 Iowa, 352.

²⁰ *Montgomery v. Gilmer*, 33 Ala. 116.

²¹ *Clark v. Willett*, 35 Cal. 534.

proper way of putting tile in the kiln for burning ; ¹ mill-wrights, as to the character of a mill, and of mill work ; ² ship-wrights, on questions of seaworthiness ; ³ mill-owners, as to the skilfulness of a millwright, ⁴ tanners, as to the best mode of tanning a hide ; ⁵ experts in insurance, as to the practice of insurance companies. ⁶ So engineers have been permitted to give their opinions as to the effect of an embankment on a harbor ; ⁷ as to the way in which a steamboat was struck, at a collision, ⁸ as to the force of particular tides and streams of water. ⁹ A witness who testified that he had control of a stationary steam-engine, and that while he did not claim to be a practical engineer, he had fired and handled a locomotive, and understood an engine, may testify as an expert as to the effect of a leaky throttle-valve on a locomotive engine. ¹⁰ An engineer, also, may testify as to the cause of a particular bayou ; ¹¹ and as to the effect of certain drains on a fountain of water. ¹² Surveyors, versed in the peculiar practice of their profession, may speak as to the meaning and effect of plans requiring such explanation, ¹³ but not as to the true location of land which is in controversy. ¹⁴ But the specialty must be that in which the expert is skilled. ¹⁵ Thus a painter cannot be examined as to the construction of a building. ¹⁶ Nor is a surveyor of highways, who is not an expert in road building, admissible to testify as to the safety of a road. ¹⁷ Nor can a surveyor be admitted to testify as to the legal interpretation to be

¹ *Vandine v. Burpee*, 13 Metc. (Mass.) 288.

² *Wiggins v. Wallace*, 19 Barb. 338 ; *Hammond v. Woodman*, 41 Me. 177 ; *Detweiler v. Groff*, 10 Penn. St. 376 ; *Walker v. Fields*, 28 Ga. 237.

³ *Beckworth v. Sydebotham*, 1 Camp. 116 ; *Thornton v. Ins. Co. Pea. R.* 25 ; *Cook v. Castner*, 9 Cush. 266.

⁴ *Doster v. Brown*, 25 Ga. 24.

⁵ *Bearss v. Copley*, 10 N. Y. 93.

⁶ *Infra*, § 507.

⁷ *Folkes v. Chadd*, 3 Doug. 157.

⁸ *Clipper v. Logan*, 18 Oh. 375.

⁹ *Phillips v. Terry*, 3 Abb. (N. Y.) App. 607 ; *Porter v. Pequonnoc Man. Co.* 17 Conn. 249.

¹⁰ *Brabbitts v. R. R.* 38 Wise. 290.

¹¹ *Avery v. Police Jury*, 12 La. An. 654.

¹² *Buffum v. Harris*, 5 R. I. 243.

¹³ *Messer v. Reginnitter*, 32 Iowa, 312 ; *Clegg v. Fields*, 7 Jones L. (N. C.) 37 ; *Brantly v. Swift*, 24 Ala. 390.

¹⁴ *Wallace v. Goodall*, 18 N. H. 439 ; *Randolph v. Adams*, 2 W. Va. 519 ; *Stevens v. West*, 6 Jones (N. C.) L. 49 ; *Blumenthal v. Roll*, 24 Mo. 113 ; *Schultz v. Lindell*, 30 Mo. 310.

¹⁵ *Supra*, § 439.

¹⁶ *Kilbourne v. Jennings*, 38 Iowa, 533.

¹⁷ *Lincoln v. Barre*, 5 Cush. 590.

given to a survey.¹ But practical surveyors may express their opinions, whether certain marks on trees, piles of stone, &c., were intended as monuments of boundaries.²

§ 445. A specialist in a particular art is admissible to prove the conditions of such art. Thus a painter, whether So of artists. professional or amateur, is admissible on the question of the genuineness of a picture ;³ a photographer, as to the character of the execution of a photograph.⁴ So, where the question was whether a paper had contained certain pencil marks, which were alleged to have been rubbed out, the opinion of an engraver, who had examined the paper with a mirror, was held to be admissible evidence, *valeat quantum*.⁵ Seal-engravers, also, as we have seen, may be called to give their opinions upon an impression, whether it was made from an original seal, or from another impression.⁶

§ 446. So of persons familiar with a market. So persons familiar with a market have been examined as to what are the demands of such market, what is the market valuation of a particular article, and how such value is affected by particular influences. Thus, an underwriter or broker, who has become familiar with the extent to which a particular circumstance affects premiums, may prove such extent ;⁷ an experienced insurance agent may speak as to the effect of certain conditions on insurance ;⁸ a business man, familiar with what is paid for particular services, as to the value of such services.⁹ So pork-packers may be examined as to the effect of transportation on hams ;¹⁰ and horse-dealers as to how far cribbing affects the value of a horse.¹¹ In fine, market value can be proved by any one conversant with the markets. If the thing is one of ordinary use, ordinary business experience is

¹ *Ormsby v. Ihmsen*, 34 Penn. St. 462. *Infra*, § 972.

² *Davis v. Mason*, 4 Pick. 156.

³ *Abbey v. Lill*, 5 Bing. 299, 304 ; *Woodcock v. Houldsworth*, 16 M. & W. 124.

⁴ *Barnes v. Ingalls*, 39 Ala. 193.

⁵ *R. v. Williams*, 8 C. & P. 434, per Parke, B., and Tindal, C. J.

⁶ Per *Ld. Mansfield*, in *Folkes v. Chadd*, 3 Doug. 157.

⁷ *Hawes v. Ins. Co.* 2 Curt. 130. See *infra*, § 447.

⁸ *Hobby v. Dane*, 17 Barb. 111 ; *Kern v. Ins. Co.* 40 Mo. 19. See *Hartford Ins. Co. v. Harmer*, 2 Oh. St. 452.

⁹ *McCollum v. Seward*, 62 N. Y. 316.

¹⁰ *Kershaw v. Wright*, 115 Mass. 361.

¹¹ *Miller v. Smith*, 112 Mass. 470.

sufficient for this purpose.¹ And, as a general rule, persons accustomed to deal in real estate, or other property, may be examined as to the value of such property, and the effect on it of certain extraneous conditions.²

¹ *Alfonso v. U. S.* 2 Story, 421; *Whipple v. Walpole*, 10 N. H. 130; *Peterboro' v. Jaffrey*, 6 N. H. 462; *Lowe v. R. R.* 45 N. H. 370; *Vandine v. Burpee*, 13 Metc. (Mass.) 288; *Walker v. Boston*, 8 Cush. 179; *Dwight v. County*, 11 Cush. 201; *Russell v. R. R.* 4 Gray, 607; *Swan v. Middlesex*, 101 Mass. 173; *Smith v. Hill*, 22 Barb. 656; *Todd v. Warner*, 48 How. (N. Y.) Pr. 234; *Van Deusen v. Young*, 29 N. Y. 9; *Robertson v. Knapp*, 35 N. Y. 91; *Hood v. Maxwell*, 1 W. Va. 219; *Butler v. Mehrling*, 15 Ill. 488; *Ohio R. R. v. Irvin*, 27 Ill. 178; *Hough v. Cook*, 69 Ill. 581; *Frankfort R. R. v. Windsor*, 51 Ind. 238; *Kermott v. Ayer*, 11 Mich. 181; *Ward v. Reynolds*, 32 Ala. 384; *Rawles v. James*, 49 Ala. 183; *Cantling v. R. R.* 54 Mo. 385; *Hastings v. Uncle Sam*, 10 Cal. 341; *Gonzales v. McHugh*, 21 Tex. 256.

² *Webber v. R. R.* 2 Metc. 147; *Swan v. Middlesex*, 101 Mass. 173; *Lawton v. Chase*, 108 Mass. 238; *Browning v. R. R.* 2 Daly, 117; *Orr v. N. Y.* 64 Barb. 106; *Teerpenning v. Ins. Co.* 43 N. Y. 279; *Bedell v. R. R.* 44 N. Y. 367; *Van Deusen v. Young*, 29 Barb. 9; *McDonald v. Christie*, 42 Barb. 36; *Stone v. Covell*, 29 Mich. 379; *Brackett v. Edgerton*, 14 Minn. 174; *Snyder v. R. R.* 25 Wisc. 60. See *Seyfarth v. St. Louis*, 52 Mo. 449.

"A witness who is acquainted with the land, and knows its capabilities and the proper mode of cultivating it, can form a more intelligent opinion than the jury, whose judgment, unless they can be aided by the opinions of such witnesses, must be formed solely upon

a rapid view or a description of the premises. We are of the opinion that the case at bar falls within the principle of the numerous adjudications in this commonwealth, which permit the opinions of competent witnesses to be given as to the value of land taken, or as to the damages or benefits to adjoining land, to aid the judgments of the jurors." *Vandine v. Burpee*, 13 Met. 288; *Walker v. Boston*, 8 Cush. 279; *Shaw v. Charlestown*, 2 Gray, 107; *West Newbury v. Chase*, 5 Gray, 421; *Swan v. Middlesex*, 101 Mass. 173; *Sexton v. North Bridgewater*, 116 Mass. 200.

"The question whether a witness has the requisite knowledge to enable him to give his opinion, is one which is largely within the discretion of the presiding judge or officer. In this case the witness was a farmer, having a farm near the petitioners, which was divided by a railroad, who knew the petitioner's farm, his mode and necessities in the management of his farm, and his means of crossing the railroad. We cannot see that the presiding officer erred in admitting his testimony." *Morton, J., Tucker v. Mass. Central R. R.* 118 Mass. 517.

"On the issue of the value to the lessee of rooms in a building which had been taken by a city to widen a street, it is within the discretion of the judge presiding at the trial to permit a witness who underlets rooms in a building in the vicinity, and who, for this purpose, has informed himself generally of the rents of buildings, to give an opinion as to the value of the lessee's premises, although he has not examined, and is not familiar with, the

On questions of valuation of property it is impracticable to lay down any precise line of demarcation between the expert and the non-expert. The safest course is to permit the examination of all having experience in the thing to be valued, leaving their authority to be tested on their cross-examination.¹ Courts of error will deal liberally with questions of this class, and will not reverse because the culture of the expert is not sufficiently special, when ordinary competency appears;² though some special qualifications must be shown.³

§ 447. The cases bearing an opinion as to value are so numerous as to invite peculiar consideration. As will be hereafter seen,⁴ the value of a particular thing at a particular moment or place is to be inferred from various facts, among which may be mentioned its possession of certain intrinsic conditions enabling it to meet a market demand, and its value at other times and places, so as to give it a marketable price. Two essentials, therefore, exist to a proper estimate of value: first, a knowledge of the intrinsic properties of the thing; secondly, a knowledge of the state of the markets. As to such intrinsic properties as are occult, and out of the range of common observers, experts are required to testify; as to properties which are cognizable by an observer of ordinary business sagacity, being familiar with the thing, such an observer is permitted

building in question." *Lawrence v. Boston*, 119 Mass. 126, Gray, C. J.

"Upon the assessment of damages sustained by the taking of land for a highway, a witness who has testified without objection to the value of the land taken may state the reasons of his opinion. By the court. The refusal of the sheriff, to permit the witness Almy to state the reasons of his opinion, was erroneous. The point has been repeatedly decided, both as to witnesses testifying to value, and as to experts, strictly so called. *Commonwealth v. Webster*, 5 Cush. 295; *Keith v. Lothrop*, 10 Cush. 453; *Diekenson v. Fitchburg*, 13 Gray, 546; *Lincoln v. Taunton Copper Co.* 9 Allen, 181; *Sexton v. North Bridgewater*, 116

Mass. 200; *Demerritt v. Randall*, 116 Mass. 331." *Hawkins v. City of Fall River*, 119 Mass. 94.

¹ *Webber v. R. R.* 2 Mete. 147; *Diekenson v. Fitchburg*, 13 Gray, 546; *Brady v. Brady*, 8 Allen, 101; *Swan v. Middlesex Co.* 101 Mass. 173; *Lawton v. Chase*, 108 Mass. 238; *Teerpenning v. Ins. Co.* 43 N. Y. 279; *Bedell v. R. R.* 44 N. Y. 367; *Brackett v. Edgerton*, 14 Minn. 174; *Snyder v. R. R.* 25 Wise. 60. See *infra*, §§ 531-546; *supra*, § 438.

² *Delaware Towboat Co. v. Starrs*, 69 Penn. St. 36.

³ *Mercer v. Vose*, 40 N. Y. Sup. Ct. 218; *Sanford v. Shepard*, 14 Kans. 228. See *supra*, § 439.

⁴ *Infra*, § 1290.

to testify.¹ So the influence on value of certain patent conditions (*e. g.* railroad construction, opening of highways) may be thus estimated by witnesses of business sagacity, of ordinary familiarity with such values.² But as to effects which only an expert can measure, only an expert can be examined.³

§ 448. It is elsewhere noticed that conclusions as to value are largely made up of presumptions.⁴ We presume that the value a marketable article had a year ago it continues to have; we take the value it has in a proximate and sympathetic market as one of the data from which to determine the value it has in our own market. For the same reason we resort to the general value, belonging to things of a given class, in order to infer the value of a particular member of such class. A witness, for instance, may not be able to speak of the exact distinctive value of an article he has not seen. He is allowed, however, to speak of the market value of the class to which this article belongs. He has never, for instance, seen a horse whose value is in controversy; and he cannot, therefore, answer as to the specific value. But he may answer as to the generic value of horses, of age, color, soundness, and speed, such as those assumed to belong to this particular horse. Thus, it

Generic
value ad-
missible
in order to
infer spe-
cific.

¹ See cases in § 446; and see *Haskins v. Ins. Co.* 5 Gray, 432; *Davis v. Elliott*, 15 Gray, 90; *Fowler v. Middlesex*, 6 Allen, 926; *Whitman v. R. R.* 7 Allen, 313; *Kendall v. May*, 10 Allen, 59; *Rogers v. Ackerman*, 22 Barb. 134; *Clark v. Baird*, 9 N. Y. 183; *Butler v. Mehrling*, 15 Ill. 488; *Hough v. Cook*, 69 Ill. 581; *Crouse v. Holman*, 19 Ind. 30; *Frankfort R. R. v. Windsor*, 51 Ind. 238; *Anson v. Dwight*, 18 Iowa, 241; *Continental Ins. Co. v. Horton*, 28 Mich. 173; *Whitfield v. Whitfield*, 40 Miss. 350.

Where the plaintiff sued for services in purchasing a mill for the defendant, he not being a real estate broker, and no agreement had been made as to the amount of his compensation, it was held that, upon inquiry as to what his services were reasonably worth, the evidence of a real es-

tate broker, as to the commission that he charged for such a service, and as to what he would have charged in the case in question, was admissible. *Eltling v. Sturtevant*, 41 Conn. 176.

² *Dwight v. County*, 11 Cush. 201; *West Newbury v. Chase*, 5 Gray, 421; *Rochester R. R. v. Budlong*, 10 How. (N. Y.) Pr. 289; *Brown v. Corey*, 43 Penn. St. 495; *Cleveland R. R. v. Ball*, 5 Oh. St. 568.

³ *Clark v. Rockland*, 52 Me. 68; *Buffum v. R. R.* 4 R. I. 221; *Forbes v. Howard*, 4 R. I. 364; *Whitney v. Boston*, 98 Mass. 312; *Lamoure v. Caryl*, 4 Denio, 370; *Clusman v. Merkel*, 3 Bosw. 402; *Sinclair v. Roush*, 14 Ind. 450; *Dalzell v. Davenport*, 12 Iowa, 437; *Efelt v. Smith*, 1 Minn. 125; *Sanford v. Shepard*, 14 Kans. 228. *Supra*, § 439.

⁴ *Infra*, § 1290.

has been held admissible to ask an expert as to the general value of a good, well-broken setter dog; ¹ and how far cribbing affects the market value of a horse.² But a mere speculative surmise,

¹ *Brill v. Flagler*, 23 Wend. 354, cited in next note.

² *Miller v. Smith*, 112 Mass. 475.

"Whenever the value of any peculiar kind of property, which may not be presumed to be within the actual knowledge of all jurors, is in issue, the testimony of witnesses acquainted with the value of similar property is admissible, although they have never seen the very article in question. *Beecher v. Denniston*, 13 Gray, 354; *Fitchburg Railroad Co. v. Freeman*, 12 Gray, 401; *Brady v. Brady*, 8 Allen, 101; *Cornell v. Dean*, 105 Mass. 435; *Lawton v. Chase*, 108 Mass. 238. A witness having the requisite knowledge and experience may always be examined by hypothetical questions, even if he has not seen the particular subject to which the trial relates, and has not heard all the other evidence given in the case. *Woodbury v. Obear*, 7 Gray, 467; *Hunt v. Lowell Gas Light Co.* 8 Allen, 169, 172.

"In *Brill v. Flagler*, 23 Wend. 354, which was an action of trespass for killing a setter dog, one inquiry permitted to be made, against objection, was, 'as to the value of a good, well-broke setter dog;' and Chief Justice Nelson was of opinion that, in answer to such an inquiry, the testimony of witnesses acquainted with the peculiar qualities of setter dogs, and who had some knowledge of their value in the market, was admissible (although they gave their opinions as to the value of setter dogs generally, and not as to the value of the plaintiff's dog in particular), upon the ground that 'they are supposed to be better acquainted with the general market value of such animals than the generality of mankind,' and that 'a common standard is

thus fixed that may assist in arriving at the value in the particular instance, which will vary according to the quality, condition, &c., of the article in question.' His only doubt as to the admission of the testimony seems to have been whether the proof of the breed and qualities of the plaintiff's dog was sufficient to authorize the general inquiry; and his opinion in favor of the competency of the testimony appears to have been approved by this court in *Vandine v. Burpee*, 13 Met. 288, 291.

"In the present case, the question whether cribbing was unsoundness, and, if it was, how far it affected the value of the mare in question, were questions of fact for the jury. *Washburn v. Cuddihy*, 8 Gray, 430. But it is not to be presumed that all jurors are necessarily acquainted with the effect of this habit upon the value of fast trotting horses. No objection was made to any of the witnesses on the ground of their want of knowledge or experience; and we are of the opinion that all the interrogatories objected to were competent. The third asked for the value of fast trotting horses of a certain age, size, gait, speed, and other qualities. The fourth was whether the habit of cribbing or wind sucking injured fast trotting horses for use and in market value, and how much. And the fifth was substantially a repetition of the fourth, as applied to a horse such as described in the third, and of the value which the plaintiff paid the defendant for the mare in question, and which the defendant testified at the trial was her fair value." Gray, C. J., *Miller v. Smith*, 112 Mass. 475.

So in an action for the conversion of tobacco raised in 1872, a witness,

based upon imaginary conditions, is irrelevant.¹ Thus, upon the issue of the value of vacant land taken pursuant to the St. of 1873, c. 189, for a post-office in Boston, the testimony of an expert as to what would be the fair rental value of the land with a suitable and proper building upon it, has been held inadmissible.²

§ 449. Value, it must be remembered, consists in the estimate, in the opinion of those influencing a market, attachable to certain intrinsic qualities belonging to the article to be valued. The opinion of such persons can only be presented, in most cases, by hearsay. A broker, for instance, who is called as to the market value of a particular

Proof of a market value may be through hearsay.

who testified as an expert that, in September, 1874, when a demand was made, there was a market value to the crop of 1872 tobacco grown in the vicinity, so that he could tell the value of a lot of that tobacco without seeing it, or knowing more of it than it was of that crop, was held rightfully admitted to testify, against the defendant's objection, that the value was from eight to ten cents per pound, though the witness on cross-examination testified, among other things, that he could not tell the value of any particular crop raised that year, save by inspection, sample, or description, and that lots of tobacco raised that year differed very much, and no two were alike. *Draper v. Saxton*, 118 Mass. 428.

"The witness Tucker was properly allowed to testify to the value of the tobacco crop of 1872 in that vicinity. The objection is not made to the witness on the ground of his want of knowledge or experience, but to the competency of the evidence itself. Such evidence is competent for the purpose of ascertaining the market value of a certain class or kind of property, and may assist in determining the value of an article belonging to that class, although the value of the

particular article may vary according to its condition and quality. The competency of this evidence is fully considered and the cases cited in *Miller v. Smith*, 112 Mass. 470." *Endicott, J., Draper v. Saxton*, 118 Mass. 431.

¹ *Brown v. R. R.* 5 Gray, 35; *Wesson v. Iron Co.* 13 Allen, 95; *Fairbanks v. Fitchburg*, 110 Mass. 224.

² *Burt v. Wigglesworth*, 117 Mass. 302.

"But testimony as to what would be the fair rental value of the land with a suitable and proper building upon it related to mere matter of opinion as to the future, not of present fact, and was too prospective and indefinite in its nature to be competent evidence of the present value of the land not built upon. *Fairbanks v. Fitchburg*, 110 Mass. 224; *Brown v. Providence, Warren & Bristol Railroad*, 5 Gray, 35, 39; *Wesson v. Washburn Iron Co.* 13 Allen, 95, 100. The statement of Comer upon this point was not given by him as one of the reasons upon which his opinion as to the value of the land was founded, but in answer to a distinct question of counsel, which should have been excluded by the presiding judge." Gray, C. J., *Burt v. Wigglesworth*, 117 Mass. 306.

piece of property, and who is cross-examined as to the sources of his knowledge, must ultimately say, "it came from A., B., and C." Even should we call A., B., and C., we would get no further than hearsay; for the testimony of either A., B., or C., as to what he would give for the article, is of little weight, unless such testimony is based, not on any properties of the thing making it peculiarly valuable to this particular witness, but on the estimation at which the thing is generally held in the market. Hence it is that it is no objection to the evidence of a witness testifying as to market value that such evidence rests on hearsay.¹ So, it is admissible to fall back, as a basis of opinion, on prices current, provided they be traceable to reliable sources.²

✓ § 450. The distinctions just expressed may be applied to litigation to determine the amount of damage sustained by a party by another's act. When the thing damaged is one of every day use, whose depreciation an ordinary business observer can estimate, then such an observer may be called to express his opinion of the extent of the damage sustained. If the facts which form the basis of such an opinion can be specified, then they must be stated; if the conclusion is one which the jury can draw, then to the jury must be left the draw-

¹ Supra, § 255; *Cliquot's Champagne*, 3 Wall. 114; *Laurent v. Vaughan*, 30 Vt. 90; *Beach v. Deniston*, 13 Gray, 354; *Eldridge v. Smith*, 13 Allen, 140; *Whitbeck v. R. R.* 36 Barb. 644; *Mish v. Wood*, 34 Penn. St. 222; *Doane v. Garretson*, 24 Iowa, 351.

² Infra, § 672; *Cliquot's Champagne*, 3 Wall. 17; *Laurent v. Vaughan*, 30 Vt. 90; *Whitney v. Thacher*, 117 Mass. 527; *Whelan v. Lynch*, 60 N. Y. 469; though see *Schmidt v. Herfurth*, 5 Robb. (N. Y.) 124.

"The exception on account of the evidence admitted to show the fall in the price of gunny bags is presented in several aspects. 1. We see no reason why merchandise brokers in Boston, members of firms doing business, and having houses established both in

Boston and New York, might not properly be admitted to testify as to the market value, at a particular date, of an article of merchandise with which they were familiar, even though their knowledge was chiefly obtained from 'daily price current lists and returns of sales daily furnished them in Boston, from their New York houses.' It is not necessary, in order to qualify one to give an opinion as to values, that his information should be of such a direct character as would make it competent in itself as primary evidence. It is the experience he acquires in the ordinary conduct of affairs, and from means of information such as are usually relied on by men engaged in business, for the conduct of that business, that qualifies him to testify." Wells, *J.*, *Whitney v. Thacher*, 117 Mass. 527.

ing the conclusion. But when, as is often the case, these facts can be best expressed by the damage they cause, then this damage and its extent may be testified to by the witness.¹ On the other hand, where the injury sustained is of an occult character, which only an expert can properly gauge, or when the knowledge of the value is special, belonging, not to business men generally, but only to specialists, then, if opinion as to damage is to be proved, a specialist must be called to give such opinion, and ordinary observers are inadmissible for this purpose.²

§ 451. Insanity is a topic as to which, in its scientific relations, experts may be examined on a hypothetical case, which may be put in such a way as to comprise the facts on trial;³ while on the question as to whether a particular person is insane, there is a strong chain of decisions to the effect that not merely physicians, skilled in diseases of the mind, but intelligent and observant attendants and friends, who had constant intercourse with the patient, may be examined.⁴ So far as concerns senile dementia, or other chronic mental disease, the practical observation of business men, coming into constant intercourse with a party, is nat-

On questions of sanity, not only experts but friends and attendants may give opinion.

¹ *West Newbury v. Chase*, 5 Gray, 421; *Shattuck v. Stoneham* R. R. 6 Allen, 115; *Norman v. Wells*, 17 Wend. 136; *Dolittle v. Eddy*, 7 Barb. 74; *Simons v. Monier*, 29 Barb. 419; *Duff v. Lyon*, 1 E. D. Smith, 536; *Brown v. Corey*, 43 Penn. St. 495. See *Cleveland R. R. v. Ball*, 5 Oh. St. 568; *Ottawa v. Graham*, 35 Ill. 346; *Watry v. Hiltgen*, 16 Wis. 516.

² *Clark v. Rockland*, 52 Me. 68; *Webber v. R. R.* 2 Mete. 147; *Whitney v. Boston*, 98 Mass. 312; *Buffum v. R. R.* 4 R. I. 221; *Fish v. Dodge*, 4 Denio, 311; *Lamoure v. Caryl*, 4 Denio, 370; *Sinclair v. Roush*, 14 Ind. 450; *Whitmore v. Bowman*, 4 Greene, 148.

³ *Com. v. Rogers*, 7 Mete. (Mass.) 500; *State v. Windsor*, 5 Harring. (Del.) 512, and cases infra, § 452.

⁴ *Wheeler v. Alderson*, 3 Hagg. 574; *Wright v. Tatham*, 5 Cl. & F.

692; *Harrison v. Rowan*, 3 Wash. C. C. 580; *Cram v. Cram*, 33 Vt. 15; *Fairchild v. Bascomb*, 35 Vt. 398; *Grant v. Thompson*, 4 Conn. 203; *Kinne v. Kinne*, 9 Conn. 102; *Real v. People*, 42 N. Y. 270; *Fagnan v. Knox*, 40 N. Y. Sup. Ct. 41; *Rambler v. Tryon*, 7 S. & R. 90; *Wilkinson v. Pearson*, 23 Penn. St. 177; *Castner v. Sliker*, 33 N. J. L. 95, 507; *Titlow v. Titlow*, 54 Penn. St. 216; *Townshend v. Townshend*, 7 Gill, 10; *Weems v. Weems*, 19 Md. 334; *Clark v. State*, 12 Ohio, 483; *Doe v. Reagan*, 5 Blackf. 217; *Beaubien v. Cicotte*, 12 Mich. 159; *Clary v. Clary*, 2 Ired. L. 78; *Powell v. State*, 25 Ala. 21; *Stuckey v. Bellah*, 41 Ala. 700; *Wilkinson v. Moseley*, 30 Ala. 562; *Baldwin v. State*, 12 Mo. 223; *Dove v. State*, 3 Heisk. 318; *People v. Sanford*, 43 Cal. 29.

urally more likely to attract confidence than are the speculative conclusions of experts, even though the latter have paid the party occasional visits.¹ By non-experts, it is said, opinions cannot be given detached from the facts on which they rest;² but this distinction amounts to little, since experts, no matter how authoritative, are required, if asked, to give the facts on which their opinions rest.³ The distinction as to hypothetical cases, however, is well founded; and as to these it is clear a layman, or even an expert without special cultivation, cannot be asked.⁴ But while an expert who has personally visited a patient can unquestionably be asked for his opinion as to the patient's sanity;⁵ his conclusions must be drawn from direct observation, not from the reports of others.⁶ As to whether a party at a given time was intoxicated, non-experts as well as experts can speak.⁷

¹ *Rutherford v. Morris*, 77 Ill. 397; *Rankin v. Rankin*, 61 Mo. 295.

As limiting non-experts to a bare statement of facts, see *State v. Pike*, 49 N. H. 399; *Com. v. Wilson*, 1 Gray, 337; *Dewitt v. Barley*, 5 Selden, 371; *Clapp v. Fullerton*, 34 N. Y. 190; *Real v. People*, 42 N. Y. 270; *Sears v. Schafer*, 1 Barb. 408; *Higgins v. Carlton*, 28 Md. 115; *Runyan v. Price*, 15 Oh. St. 1; *Farrell v. Brennan*, 32 Mo. 328; *Gehrke v. State*, 13 Tex. 568. From this limitation, however, subscribing witnesses are excepted. *Ware v. Ware*, 8 Greenl. 42; *Poole v. Richardson*, 3 Mass. 330; *Logan v. McGinnis*, 12 Penn. St. 27; *Titlow v. Titlow*, 54 Penn. St. 216; *Egbert v. Egbert*, 78 Penn. St. 326; *Elder v. Ogletree*, 36 Ga. 64.

² *Poole v. Richardson*, 3 Mass. 330; *Hathorn v. King*, 8 Mass. 371; *Dickenson v. Barber*, 9 Mass. 225; *Kinne v. Kinne*, 9 Conn. 102; *Vanauken's case*, 2 Stockt. Ch. 186; *Lowe v. Williamson*, 1 Green. Eq. 82; *Sloan v. Maxwell*, 2 Green. Eq. 563; *Gardiner v. Gardiner*, 34 N. Y. 155; *Sisson v. Conger*, 1 Thomp. & C. 564; *Clapp v. Fullerton*, 34 N. Y. 190; *Rambler v.*

Tryon, 7 Serg. & R. 90; *Bricker v. Lightner*, 40 Penn. St. 199; *Gibson v. Gibson*, 9 Yerger, 329; *Dorsey v. Warfield*, 7 Md. 65; *Doe v. Reagan*, 5 Blackf. 217; *Potts v. House*, 6 Ga. 324; *Dicken v. Johnson*, 7 Ga. 484; *Walker v. Walker*, 14 Ga. 242; *Johnson v. State*, 17 Ala. 618; *Farrell v. Brennan*, 32 Mo. 328.

³ *Stackhouse v. Horton*, 15 N. J. Eq. 202; *White v. Bailey*, 10 Mich. 155.

⁴ *Com. v. Rich*, 14 Gray, 335; *State v. Klinger*, 46 Mo. 228; *Caleb v. State*, 39 Miss. 722.

⁵ *R. v. Searle*, 1 Mood. & R. 75; *R. v. Offord*, 5 C. & P. 168; *Com. v. Rogers*, 7 Mete. (Mass.) 500; *Baxter v. Abbott*, 7 Gray, 71; *Delafield v. Parish*, 25 N. Y. 9; *Clark v. State*, 12 Ohio, 483; *Choice v. State*, 31 Ga. 424.

⁶ *Heald v. Thing*, 45 Me. 392.

⁷ *State v. Pike*, 49 N. H. 399; *Gahagan v. R. R.* 1 Allen, 187; *People v. Eastwood*, 14 N. Y. 562; *Stanley v. State*, 26 Ala. 26.

On an issue as to the sanity of a testator, it was proposed to tender a letter (purporting to be from the testator) to a medical witness, and ask

§ 452. The better opinion is that an expert cannot be asked his opinion as to the evidence in the case as rendered, not only because this puts the expert in the place of the jury, in determining as to the credibility of the facts in evidence, but because the relief thus afforded is in most trials only illusory, experts being usually in conflict; and the duty devolving on court and jury, of supervising the reasoning of experts, being one which can be rarely escaped.¹ It has been said, however, that when the facts are undisputed, the opinion of an expert can be asked as to the conclusions to be drawn from them;² and it is now settled that experts of all classes may be asked as to a hypothetical case.³ Thus, shipwrights have been examined as to the seaworthiness of a ship in a particular condition,⁴ and sailors whether a certain mode of navigation was prudent in an assumed state of facts.⁵ So an expert as a driver may be asked as to the number of persons necessary to drive

Experts may be examined as to hypothetical case.

him whether the writer of such a letter could be of sound mind. *Martin, B.*, held that this could not be done; but that the letter must first be proved to be in the testator's writing, and that the witness might then be asked if it was a rational letter. *Sharpe v. Macaulay*, Western Circuit, 1856, MS.; *Powell's Evidence* (4th ed.), 99.

¹ *R. v. Higginson*, 1 Car. & K. 129; *Sills v. Brown*, 9 C. & P. 604; *R. v. Frances*, 4 Cox C. C. 57; *R. v. Richards*, 1 F. & F. 87; *Dexter v. Hall*, 15 Wall. 9; *Willey v. Portsmouth*, 35 N. H. 303; *Perkins v. R. R.* 44 N. H. 223; *Woodbury v. Obear*, 7 Gray, 467; *Miller v. Smith*, 112 Mass. 475; *Draper v. Saxton*, 118 Mass. 431; *Brill v. Flagler*, 23 Wend. 354; *People v. McCann*, 3 Parker, C. R. 272; *State v. Powell*, 2 Halst. 244; *Kempsey v. McGinniss*, 21 Mich. 123; *Bishop v. Spining*, 38 Ind. 143; *Phillips v. Starr*, 26 Iowa, 319; *State v. Medlicott*, 9 Kans. 257; *Choice v. State*, 31 Ga. 424.

² *McNaghton's case*, 10 Cl. & F.

200, 211, 212; 1 C. & K. 135; though see *R. v. Frances*, 4 Cox C. C. 57.

³ *Dexter v. Hall*, 15 Wall. 9; *U. S. v. McGlue*, 1 Curtis. 1; *Sills v. Brown*, *ut supra*; *Spear v. Richardson*, 37 N. H. 23; *Fairechild v. Bascomb*, 35 Vt. 398; *Woodbury v. Obear*, 7 Gray, 467; *Erickson v. Smith*, 2 Abb. N. Y. App. 64; *Hoard v. Peck*, 56 Barb. 202; *Carpenter v. Blake*, 2 Lans. 206; *State v. Winsor*, 5 Harring. (Del.) 512; *Choice v. State*, 31 Ga. 424; *Davis v. State*, 35 Ind. 496; *Bishop v. Spining*, 38 Ind. 143; *Wright v. Hardy*, 22 Wise. 348; *Crawford v. Wolf*, 29 Iowa, 567; *Wilkinson v. Moseley*, 30 Ala. 562; *State v. Klingler*, 46 Mo. 224; *Tingley v. Cowgill*, 48 Mo. 291; *North Mo. R. R. v. Akers*, 4 Kans. 453; *Dove v. State*, 3 Heisk. 318; and cases cited in prior notes to this section as to insanity.

⁴ *Beekwith v. Sydebotham*, 1 Camp. 116.

⁵ *Fenwick v. Bell*, 1 C. & K. 312; *Malton v. Nesbit*, 1 C. & P. 72.

a certain number of mules.¹ But if the facts on which the hypothesis is based fall, the answer falls also.² Nor can an expert be asked as to an hypothesis having no foundation in the evidence in the case,³ or resting upon statements made to him by persons out of court.⁴

§ 453. It has been already stated that the general distinction between the expert and the non-expert is, that the former gives opinions, the latter ordinarily only facts. Expert may explain his opinion in his examination. It is a mistake, however, to suppose that an expert cannot give the reasoning on which his opinions rest. It is his duty to give such reasoning, when necessary to explain his opinions; and he may do so in his examination in chief.⁵ Beyond this he cannot go in such examination;⁶ though he may be fully examined in details in order to test his credibility and judgment.⁷ Even on a reëxamination, he may be permitted to give explanations of facts occurring since his examination in chief.⁸

§ 454. When expert testimony was first introduced, it was regarded with great respect. An expert, when called as a witness, was viewed as the representative of the science of which he was a professor, giving impartially its conclusions. Testimony of expert to be jealously scrutinized. Two conditions have combined to produce a material change in this relation. In the first place, it has been discovered that no expert, no matter how incorrupt, speaks for his science as a whole. Few specialties are so small as not to be torn by factions; and often, the smaller the specialty, the bitterer and the more inflaming and distorting are the animosities by which these factions are possessed. Peculiarly is this the case in matters psychological, in which there is no hypothesis so monstrous that an expert cannot be found to swear to it on the stand, and to defend it with vehemence when off the stand. “*Nihil tam absurde dici potest, quod non dicatur ab aliquo philosophorum.*”⁹ In the second place the retaining of experts, by a fee proportioned to the importance of their testimony, is now, in

¹ North Mo. R. R. v. Akers, 4 Kans. 453.

⁶ Ingledew v. R. R. 7 Gray, 86.

² Hovey v. Chase, 52 Me. 304; Thayer v. Davis, 38 Vt. 163.

⁷ Shaw v. Charlestown, 2 Gray, 107;

Hunt v. Lowell, 8 Allen, 169.

⁸ Farmers' Bk. v. Young, 36 Iowa,

³ Muldowney v. R. R. 39 Iowa, 615.

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⁴ Heald v. Thing, 45 Me. 392.

⁹ Cic. de Div. ii. 58.

⁵ Keith v. Lothrop, 10 Cush. 453.

cases in which they are required, as customary as is the retaining of lawyers. No court would take as authority the sworn statement of the law given by counsel, retained on a particular side, for the reason that the most high-minded men are so swayed by an employment of this kind as to lose the power of impartial judgment; and so intense is this conviction that there is no civilized community in which the reception of a present from a suitor does not only disqualify but disgrace a judge. Hence it is that, apart from the partisan temper more or less common to experts, their utterances, now that they have as a class become the retained agents of parties, have lost all judicial authority, and are entitled only to the weight which a sound and cautious criticism would award to the testimony itself.¹ In adjusting this criticism, a large allowance must be made for the bias necessarily belonging to men retained to advocate a cause, who speak, not as to *fact*, but as to *opinion*; and who are selected, on all moot questions, either from their prior advocacy of, or from their readiness to adopt, the opinion to be proved. In this sense we may adopt the strong language of Lord Campbell, that "skilled witnesses come with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence."²

¹ See, to this effect, Neal's case, cited 1 Redfield on Wills, ch. iii. § 13; Woodruff, J., Gay v. Ins. Co. 2 Big. Life Ins. Cases, 14; Brehm v. R. R. 34 Barb. 256; Grigsby v. Water Co. 40 Cal. 396; Watson v. Anderson, 13 Ala. 202; 1 Whart. & St. Med. Jur. (1873) §§ 190, 269; Whart. Cr. Law, 7th ed. §§ 50 *et seq.* See, also, 1 Am. Law Rev. 45, for a learned article on this topic by Prof. Washburn.

² Tracy Peerage, 10 Cl. & Fin. 191. See, also, Winans v. R. R. 21 How. 101.

"The conflict of testimony between scientific men in judicial investigations has often been the subject of remark. A noted instance of such conflict is now presented in the Wharton murder trial. A striking instance of an unexpected source of error in scien-

tific investigations was witnessed in the last case tried by Mr. Justice Jones in the superior court in this city, being the case in which the house of J. & J. Coleman established their right to a bull's head as their trademark on mustard. Professor X., one of the most celebrated analytical chemists of New York, a witness called by the defendant, had alleged, as the result of his experiments, that mustard contained over eleven per cent. of starch.

"Two other analytical chemists, one of them Professor Chandler, of Columbia College, alleged that mustard contained no starch. The evidence was in this conflicting condition when both parties rested, and the case was adjourned until the next morning for argument. In the mean time Professor

§ 455. The practice has been to receive for what it is worth the testimony of an expert, when his observations are made *ex parte*, as when a chemist sent by one party, examines, without notice to the other party, remains supposed to contain poison, or a physician is taken by

Epecially
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X. applied to the counsel of the defendant to move to so far open the case as to allow him to vindicate by actual experiment in open court, the correctness of his statement as to existence of starch in mustard. The motion was made and granted, and on the 5th of December last the court room presented the appearance of a chemical laboratory. The professor, with his assistant, prepared mustard for experiment in open court by pounding the seed in a mortar. He placed the crushed seed in distilled water, and boiled the mixture over a spirit lamp. He then threw some of the solution on sheets of filtering paper, and applied his chemical test, and exhibited to the court on the paper the characteristic blue iodide of starch. The experiment was varied many ways with the same result, and at the end of the testimony many sheets of paper were thus colored. The demonstration seemed perfect. On Professor Chandler being called to the stand, he made experiments which, in his view, demonstrated that starch did not exist in mustard, and stated that he was not satisfied with the experiments that had been made by the defendant's witness.

"'Why,' said the defendant's counsel, 'are you not satisfied with the reaction for starch exhibited by Dr. X. on the dozen or more sheets of filtering paper?'

"'I am not certain, to begin with,' said Professor Chandler, 'that the paper would not have produced that reaction without the mustard.' Whereupon the counsel handed to the witness some of the clean paper, and

asked him to apply the test to it himself. He did so, and the result was a deep blue, thus showing the illusory nature of the prior tests, and that the experiment was entirely worthless as proof that starch was contained in mustard.

"Now here was a chemist of great learning and experience, pledging himself under oath to the presence of starch in mustard, exhibiting, in the frankest way, his experiments in open court, and in the presence of eminent chemists, and producing as the result the characteristic blue which concededly demonstrated the presence of starch. If the question of life or death depended on this testimony could a jury have been in doubt? and yet, by oversight, a vital element in the problem had been overlooked. The thing sought for was not in the substance analyzed, but in the paper on which for convenience it had been poured." N. Y. Evening Post, Jan. 17, 1872.

To cases of litigated handwriting, the remarks which have just been made are peculiarly applicable, and will hereafter be distinctively discussed. *Infra*, § 722. An expert, however, is privileged as to his answers, however wild or prejudiced, so far as concerns liability to a civil suit. *Seaman v. Netherclift*, L. R. 1 C. P. D. 540, cited, *infra*, § 722.

The scholastic jurists, regarding experts as assessors called upon to state results dependent upon reasoning out of the power of the court to follow, treated the conclusions given by the expert as unassailable facts. These conclusions the court, if the

one party, also without notice to the other party, to visit a patient whose sanity is in dispute. In cases such as these, expert testimony is entitled to little respect, and is likely, if the observations be surreptitious and clandestine, to prejudice the party under whose directions they are made. Wherever notice of such observations to the opposing interests is practicable, then such notice should be given. If not given, then observations of the expert, thus privately made, will be exposed to discredit if not to exclusion.¹

expert was duly qualified, was bound to accept; and when there was a conflict, then the conclusions of the majority were to be followed. See, for illustration of this, *Masc. c. 1169*; and see *Endemann, 250*.

This notion, however, has been long abandoned. Of course if we could conceive of experts speaking of a science whose processes are utterly out of the range of the reasoning powers of the adjudicating tribunal, then a conflict between such experts is to be determined (apart from questions of credibility) just as we would treat the testimony of witnesses who, as to matters equally probable, contradict themselves as to the conditions of a place which no one but themselves has visited. But there is no science whose processes are utterly out of the range of the reasoning powers of even ordinary judges and juries. With some specialties, *e. g.* that which treats of insanity in its penal relations, twelve jurymen, with average sense, are capable of being so instructed, by evidence and argument, during the trial of a case, as to be able to come to a conclusion as conducive to public justice as would be twelve experts, selected in the same way. The same may be said as to many mechanical sciences; though in such cases the instruction may be tedious and laborious. But, at all events, the law no longer is that the conclusion given by

the expert is binding on the court or jury. The grounds on which the conclusion is reached may be asked for; the expert's capacity for drawing conclusions, as well as his premises, may be assailed; cases of conflict are to be determined not by the number of the witnesses but by the weight of the testimony; and though the opinion of an expert of high character may be entitled to great respect, yet, if questioned, its authority must ultimately rest upon the truth, material and formal, of the reasoning on which it depends.

¹ See *Whart. Cr. Law*, § 821 *h* (7th ed.); *Heald v. Thing*, 45 Me. 392; *Parlange v. Parlange*, 16 La. An. 17.

Judge Breese, of the Illinois supreme court, in the recent will case of *Rutherford v. Morris*, 8 *Chicago Legal News*, 94, thus speaks of experts in will cases: "These doctors were summoned by the contestants 'as experts,' for the purpose of invalidating a will deliberately made by a man quite as competent as either of them to do such an act. They were the contestants' witnesses, and so considered themselves. The testimony of such is worth but little, and should always be received by juries and courts with great caution. It was said by a distinguished judge, in a case before him, 'if there was any kind of testimony, not only of no value, but even worse than that, it

§ 456. It is not contrary to the policy of the law that an expert should be specially feed, so that the testimony of competent scientific men can be obtained without loss to themselves. Even the fact, that such a retainer existed, was unknown at the time to the opposite side, is no ground for disturbing a verdict. It is for the jury, however, to determine how far the credibility of the witness is affected by such retainer.¹

Expert
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specially
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VII. DISTINCTIVE RULES AS TO PARTIES.

§ 457. The late changes in our practice, by which parties may be examined under oath, may make it not irrelevant to examine the provisions in the Roman law in this relation. If it should appear that this privilege of examination existed in the Roman practice to the same extent as it now exists in our own, this adds not a little to the authority of the Roman jurists on the subject of presumptions. Under our old practice it was frequently said that against a party whose mouth is shut, and who cannot explain, there can be no presumption on account of his want of explanation; and to this cause may be imputed not a few of those of our presumptions of which the Roman law has no trace. Now, however, that we have opened the mouths of parties, we must conclude that presumptions based on their compulsory silence no longer exist; and we have the authority of the Roman law, supposing that law to permit the compulsory examination of witnesses, to sustain in this respect our conclusions. It is important, therefore, in order to determine the present applicability of the Roman law to this class of presumptions, to inquire what is the Roman law as to the examination of parties.

§ 458. In the older Roman practice, the parties were accustomed to resort, as a mode of compromise, to an appeal to the conscience, or *juramentum voluntarium*, by which the one agreed to abide by what the other should answer under oath. From the *juramentum voluntarium* was gradually developed the *juramentum necessarium*. The praetor, when either party applied

was, in his judgment, that of medical experts.”

¹ People v. Montgomery, 13 Abb. (N. Y.) Pr. N. S. 207. See, however,

See, for a more indulgent view, State v. Porter, 34 Iowa, 131. Lyon v. Wilkes, 1 Cow. 591.

for an appeal of this kind, agreeing to be bound by the result, forced the other party to answer. Suits which depended on the knowledge of the parties themselves, were brought to a summary conclusion. The answers made by a party, to questions thus put to him, may be likened to answers to bills of discovery, in the old chancery practice, supposing that on filing the bill the party asking for the discovery should agree to be bound by the answer.¹ An answer admitting a certain debt was considered as final, requiring no judgment. Where, however, the admission was of an uncertain debt, then process issued for the assessment of damages, on which process judgment was necessary.²

§ 459. It was not obligatory on the *actor* to adopt this mode of trial. He might proceed, if he thought proper, to substantiate his case by the means hereafter detailed. But if he elected to leave the decision to the conscience of the opposite party, the latter was bound either to concede the claim or to answer under oath. “*Ait praetor: ‘eum, a quo jusjurandum petetur, solvere aut jurare cogam.’ Alterum itaque eligat reus, aut solvat aut juret: si non juret, solvere cogendus erit a praetore.*”³ The party asking for discovery was nonsuited, as we might say, if he did not disclose facts making out a case; the opposite party, if he did not answer, had judgment taken against him by default.⁴

§ 460. Of much greater importance to our present inquiry was the practice by which the Romans made the testimony of the parties admissible in all contested issues.⁵ After the *ordo judiciorum*, as a distinct tribunal, ceased to exist, all judicial functions centred in the magistrates, who occupied a position similar to that of equity judges, or judges in common law courts trying cases without juries. While the *ordo judiciorum* still existed, issues of fact, instead of being tried before the magistrate determining the law, as they afterwards were, were sent, it will be remembered, to the *judex*, who occupied a position not unlike a master of chancery, to whom the examination and determination of facts is committed on a feigned issue. But whatever was the tribunal, the judge whose

By later practice examination of parties was permitted.

¹ See L. 34, § 6. D. xii. 2; L. 5, § 2. h. t.; Quintilian, V. c. 6; Endemann, Beweislehre, 443.

² L. 34, § 6, xii. 2.

³ Savigny, Rom. Recht. vii. § 312.

⁴ See Savigny, Rom. Recht. vii. §

⁵ Puchta, Inst. Bd. ii. 190.

313.

office it was to decide the case was authorized to examine, or to permit to be examined, either or both of the parties. The examination is referred to as if regarded as affording subsidiary proof.¹ Certainly if a party could make out his case without calling his antagonist as a witness, it was not either necessary or desirable that the antagonist should be so called. But that it was a party's right to make his antagonist a witness is clear; and it is also clear that the judge who at the close of a civil issue was in doubt could interrogate under oath either of the parties. This right is expressly confirmed by imperial decree.² But the answers thus given under oath were regarded, not as concluding the case, as with the arbitration oaths, but simply as testimony. If a party, when so examined, admitted his opponent's claim, this of course was a ground of judgment against the party making the admission. But where the party made no such admission, then his testimony was to be weighed as would the testimony of any other witness.³ The testimony of the party, when thus examined on trial, was regarded as merely evidential, and could be subsequently impeached.⁴ Yet the refusal of a party to testify was not ground for judicial action against him, as it was when he refused to answer in the arbitration procedure. When called as a witness on the trial of the case, he might decline to be sworn; and if so, the court was to determine the case on the evidence presented,⁵ subject to the logical inferences to be drawn from his refusal.⁶ The refinements which were introduced by the Italian and other scholastic jurists it is not necessary here to discuss. It is enough to say that while admitting the right of the judge to examine the parties, they limited this right to cases where there was an *inopia probationis*; ⁷ testimony so elicited was announced to be *probatio praesumptiva* or *semi plena*; ⁸ and a distinction was sought for in the nature of the cases tried. In *causis arduis seu magnis*, a party could not be examined; ⁹ while as to what constitutes a *causa ardua*, or *magna*, a new line of

¹ See Gaius in L. 31, D. xii. 2.

² See L. 3, Cod. iv. 1.

³ See L. 5, § 2, xii. 3.

⁴ See Savigny, § 313, p. 83.

⁵ See L. 12, § 2, Cod. 14, 1.

⁶ Ibid. Sent., quae quasi ex recu-

sato juramento processit. See Endemann, 448.

⁷ Mascard. I. qu. 9, 953, 24.

⁸ Durant, II. 2, de prob. § 3, nr. 10.

⁹ Gloss. in L. 31. h. t. xii. 2; Pacian,

de prob. L. c. 39, No. 19.

subtle discriminations was opened.¹ These refinements of the schoolmen were part of a peculiar scheme in which their doctrine of presumptions, elsewhere discussed, formed the leading feature; and their speculations on the two topics are mutually dependent. The *classical* Roman law in this relation, on the other hand, is substantially the same with that recently established in most Anglo-American jurisdictions. It is important to notice this fact, not because it helps us to any direct authority as to the effect of testimony so obtained, but because it adds to the logical value of the classical Roman theory of presumptions which we will hereafter discuss.² In taking the scholastic doctrine, that the testimony of parties was to be virtually rejected, we naturally accepted the scholastic theory of presumptions. When the evidence of parties, and of persons interested, is excluded, then we are justified in taking the next best evidence, and we may be even justified, following the schoolmen, in constructing a system of arbitrary rules for our guidance. But if the testimony of all parties interested is admitted, then we have no need to resort to presumptions based on the hypothesis of the incapacity of the parties to speak, and our examination of litigated facts is to be conducted by the ordinary processes of logic.³

§ 461. The testimony of a party in his own cause, to refer again to the important distinction elsewhere put,⁴ may be either contractual, so as to bind him directly to the opposite party, or strictly evidential, as giving proof of certain facts. A party, for instance, according to the old practice, in answer to a bill of discovery, admits an obligation to the opposite party. This admission concludes him, and judgment may be taken against him for the sum admitted. He states, on the other hand, certain facts, from which inferences unfavorable to him may be drawn. These facts are simply evidential; and on the trial of the cause he is entitled to prove other facts which tend to modify the inference drawn from the facts stated in his answer. So with regard to the testimony of a party, when examined, either on the trial, or according to the practice which has been recently introduced in many of our

¹ For instance, an *actio famosa*, spiritualis, is *ardua*. See Masc. c. 956; Endemann, 456.

³ See this ably argued in Endemann's *Beweislehre*.

⁴ See *infra*, §§ 920, 1082.

² *Infra*, § 1227 *et seq.*

states, under rule of court, as preliminary to trial. In such testimony he may either concede to the opposite party the whole or part of the latter's claim, or he may testify to certain facts from which inferences may be drawn, subject to the qualifications above stated in reference to bills of discovery. As to the first of these offices of a party's testimony, it must be remembered that every person has a right to dispose of his own property, and the more solemn the mode of disposal, the more complete is its juridical effectiveness. And no mode of disposition can be more solemn than that of the deliberate answer, under oath, of a party when examined by his opponent in a court of justice. It is true that such an admission may, as we will afterwards see, be withdrawn on proof of fraud or mistake. But if not so withdrawn, it is a *confessio in jure*, operating as an assignment of so much of the party's rights as are thereby involved, and forming in itself ground for a judgment of the court.¹

§ 462. We must therefore conclude that oaths taken in a cause by a party have a distinct quality not imputable to oaths taken by witnesses. A party who, either voluntarily or involuntarily, makes an oath in a cause, may, when he testifies as to a contract made with the other party, estop himself by the statements so made. He files, for instance, when sued on a note, an affidavit of defence; and in this affidavit he makes certain admissions. By these admissions he is afterwards contractually bound to the opposite party, for the reason that when he appears in a case, he enters into privity with the opposite party, and is bound to such party afterwards by his concessions. The attaching of the oath to such concessions, not only contributes their precision and their solemnity, but establishes them among the fixed landmarks by which the juridical relations of the parties are to be subsequently determined.

§ 463. We now turn to the English and American statutes removing the common law disability of parties; and the first observation to be made is that these statutes are not *ex post facto*, or obnoxious to the constitutional sanctions prohibiting laws impairing contracts. Such statutes touch remedies, not rights.²

Statutes
not *ex post*
facto.

¹ *Infra*, §§ 488, 1110-19.

² *Hubbell's case*, 4 Ct. of Claims,

§ 464. The statutes are remedial ; and their operation will not be limited by a technical closeness of construction.¹ Thus the federal statute is held to apply to cases in which the United States is a party ;² to cases in chancery ;³ to cases where a guardian is party to a suit involving his accounts ;⁴ to cases where an executor is a party unless he be specifically excluded ;⁵ to cases where a corporation is a party.⁶ The object of the statutes is to remove all artificial restraints on competency ; and in the promotion of this object, beneficent as it is, the courts are bound to unite.⁷

Such statutes to be liberally construed.

37 ; *Smyth v. Balch*, 40 N. H. 363 ; *Van Valkenburgh v. Bank*, 23 N. J. L. 583 ; *Walthall v. Walthall*, 42 Ala. 450. See *Kimball v. Baxter*, 27 Vt. 628.

¹ *Payne v. Gray*, 56 Me. 317 ; *Hosmer v. Warner*, 15 Gray, 46 ; *Delamater v. People*, 5 Lansing, 332 ; *Nourry v. Lord*, 3 Abb. (N. Y.) App. 392 ; *Jones v. Jones*, 36 Md. 447 ; *Rison v. Cribbs*, 1 Dill. 181 ; *Young v. Bank*, 51 Ill. 73 ; *Horne v. Young*, 40 Ga. 193 ; *Brand v. Abbott*, 42 Ala. 499 ; *Fugate v. Pierce*, 49 Mo. 441 ; *State v. Dec*, 14 Minn. 35 ; *Potter v. Menasha*, 30 Wis. 492. See *Goodrich v. Allen*, 19 Mich. 250.

² *Green v. U. S.* 9 Wall. 655 ; *U. S. v. Cigars*, 1 Woolw. 123.

³ *Rison v. Cribbs*, 1 Dill. 181.

⁴ *Bogia v. Darden*, 45 Ala. 269.

⁵ *Johnson v. Heald*, 33 Md. 352.

⁶ *Carr v. Ins. Co.* 3 Daly, 160.

⁷ Under the federal statutes "in the courts of the United States," to adopt the language of Chief Justice Waite, "parties are put upon a footing of equality with other witnesses, and are admissible to testify for themselves and compellable to testify for others." *New Jersey R. R. Co. v. Pollard*, 22 Wall. 350 ; citing *Texas v. Chiles*, 21 Wall. 488.

As to the adoption by the federal courts of the state statutes, see *Bean*, in re, 2 Weekly Notes, 432.

The English statutes are thus re-

capitulated by Mr. Powell : "Lord Denman's act left actual parties to the record incompetent witnesses. This disability was removed by the 14 & 15 Vict. c. 99 (the Law of Evidence Amendment Act). Finally came the Law of Evidence Further Amendment Act, 1869, 32 & 33 Vict. c. 68, which abolished the two exceptions retained by the 14 & 15 Vict. c. 99. After repeating the 4th section of the last mentioned act, the Act of 1869 renders (sect. 2) the parties to actions for breach of promise of marriage competent witnesses. The uncorroborated testimony of the plaintiff is, however, not to be sufficient proof of a promise to marry to entitle the jury to give a verdict for the plaintiff; his or her testimony must be corroborated by some *material evidence* in support of the alleged promise. The 3d section of this act renders the parties to proceedings instituted in consequence of adultery, and the husbands and wives of such parties, *competent* witnesses ; with the proviso that no witness to any proceeding, whether a party or not, is to be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness has already given evidence in the same proceeding in disproof of such adultery. The great aim of the legislature would seem to have been to enable persons

§ 465. Under the statutes, a party may have his deposition taken, as well as be examined *vivâ voce* in court.¹ Hence, the deposition of a party taken so as to be admissible in a pending suit, is admissible in a subsequent suit between the administrators of the parties as to the same subject matter.²

charged with adultery in the divorce court to deny the charge on oath. This is effected by making such persons competent witnesses. In the measure as originally brought into the house of commons, the parties were to be compellable as well as competent. To this two objections were raised: 1st. That it would induce parties to institute proceedings on very slender grounds, in the expectation of being able to elicit something in cross-examination of the respondent or co-respondent to establish their case. 2d. That an adulteress or adulterer would be very much tempted to commit perjury to screen the partner in guilt. In deference to these objections, the above mentioned proviso was added to the 3d section.

“One question presents itself upon these two sections,—are the parties to an action for breach of promise of marriage, and to proceedings instituted in consequence of adultery, *compellable* as well as competent witnesses? *Primâ facie* every witness who is competent is also compellable, unless some privilege intervenes, and therefore it may be assumed that the proper construction to be placed upon these sections is, that the parties mentioned are compellable as well as competent, except when they can claim the protection of the proviso to section 3. In fact, no doubt would present itself but

for the language of section 2, of 14 & 15 Vict. c. 99, which enacts, that the parties to any action (except as thereinafter excepted) shall ‘be competent and compellable to give evidence.’ The words ‘and compellable,’ however, would seem to be mere surplusage. The following points have been decided on the construction of this act, so far as it affects proceedings instituted in consequence of adultery. The act does not apply to a petition presented by a husband for payment of money out of court on the ground of his child having been bastardized by his wife’s adultery. *Re Rideout’s Trusts*, L. R. 10 Eq. 43; 39 L. J. Ch. 192. If a witness does not claim the protection given by the 3d section, neither of the parties to the suit can object to the evidence; *Hebblethwaite v. Hebblethwaite*, L. R. 2 P. & D. 29; 39 L. J. P. & M. 15; and a witness cannot be cross-examined as to any act of adultery not referred to in the examination in chief. *Babbage v. Babbage*, L. R. 2 P. & D. 222. Any discussion as to the testimony of interested witnesses cannot be more appropriately closed than by quoting the remarks of Lord Justice James, when vice-chancellor (*Pike v. Nicholas*, 17 W. R. 845; 38 L. J. Ch. 529): ‘It has been pressed on me that I cannot decide against the positive oath of the respondent, without convicting him of

¹ *Cornett v. Williams*, 20 Wall. 226; *New Jersey R. R. v. Pollard*, 22 Wall. 350; *Nichols v. Allen*, 112 Mass. 23; *Bourgette v. Hubinger*, 30 Ind. 296.

² *Collins v. Smith*, 78 Penn. St. 423. See, also, as to notes of testimony, *Evans v. Reed*, 78 Penn. St. 415, and *supra*, § 178.

§ 466. In most of the statutes cases are excepted where a suit is against executors or administrators, in which cases the surviving party to a contract is not permitted to testify ; or, as it is sometimes put, cases in which one of the parties to a contract is dead, in which cases the other

Cases where other contracting party is dead.

wilful and corrupt perjury. I have had occasion more than once to say that this is not a criminal court: that I am trying no one for any crime. I am here bound by my own judicial oath to well and truly try the issue joined between the parties, and a true verdict give accordingly to the evidence; that is to say, according as I, weighing all the evidence by all the lights I can get, and as best I may, find the testimony credible or incredible, trustworthy or the reverse. The law which admitted the testimony of the parties and of interested persons was passed in full reliance on the judges and on juries that they would carefully scrutinize such testimony and give it such weight as it deserved, and no more, or no weight at all.' Powell's Evidence, 4th ed. 39.

"The concluding words of the 3d section of the 14 & 15 Vict. c. 99, declare that nothing contained in the act 'shall in any *criminal* proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.' The first question which arose on the construction of this clause was as to the competency and compellability of husbands and wives to give evidence for or against each other in civil proceedings. It was held in two cases that they were severally incompetent; *Barbat v. Allen*, 7 Ex. 609; *Stapleton v. Crofts*, 18 Q. B. 367; but it appeared that it was the intention of the legislature to make them competent. And now, by the 16 & 17 Vict. c. 83, hus-

bands and wives are rendered competent and compellable, in all *civil* cases, to give evidence 'on behalf of any or either of the parties to the said suit, action, or proceeding.' But neither husband nor wife is compellable to disclose any *communication* whatsoever made to him or her by the other during marriage. After the death of either husband or wife, the privilege enures for the benefit of the survivor. See *O'Connor v. Marjoribanks*, 4 M. & G. 435. These provisions were, by the act, not to apply in criminal cases, or in proceedings instituted in consequence of adultery; but now, as stated above, the Evidence Further Amendment Act, 1869, has made the husbands and wives of parties to proceedings instituted in consequence of adultery competent witnesses." *Vile* supra, p. 38. Powell's Evidence, 4th ed. 46.

In Pennsylvania we have the following: "Since the Act of 1869, enacting that neither interest nor policy of law shall exclude a witness, the ground of *Post v. Avery* is removed by legislation. Now the policy at the bottom of that case, and its sequents, is reversed, and *prima facie* all witnesses are competent so far as interest and policy are in the question. It therefore lay upon the defendant to show a ground of incompetency still remaining to exclude the witness. As the record stood then without objection, there was nothing to show that the estate of Jonathan R. West, or that Enoch West had any interest in the controversy before the court. Since the Act of 1869, the court, in order to

party is not competent as a witness. The reason of this exception is, that when there is no mutuality there should not

act in good faith towards the legislative branch of the government, must discountenance all objections on the score of interest and policy unless they be made clearly to appear." *Agnew, J., McClelland's Executor v. West's Administrator*, 70 Penn. St. 187.

How remedial and salutary are the statutes in the view of American judges is illustrated by Judge Swayne, in the following opinion in *Texas v. Chiles*, 21 Wall. 489:—

"This is an application for an order that a subpoena issue for John Chiles, the defendant, in order that his deposition may be taken on behalf of the complainant. The proper disposition of the motion depends upon the solution of the question whether he can be required to testify by the other party. The provision of the act of Congress upon the subject is as follows:

"Section 858. In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to, or interested in the issue tried. Provided, that in actions by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty." *Rev. Stat. U. S.* 162.

"It was a rule in equity of long

standing that the complainant could examine the defendant as a witness, upon interrogatories, and that one defendant might examine another, but they could not examine the complainant without his consent, and the right to examine a defendant was attended with serious restrictions and embarrassment. 1 *Smith's Ch. Pr.* 343; 1 *Greenl. Ev.* § 361; *Eckford v. DeKay*, 6 *Paige*, 565; *Ashton v. Parker*, 14 *Sim.* 632; 2 *Daniel's Ch. Pr. Perkins's ed.* 1865, p. 885, note. A bill of discovery was a dilatory and expensive measure. 2 *Story's Eq.* §§ 1483, 1489. It was also less effectual than the examination of the defendant as a witness. In trials at law the system of exclusion was more rigid. The general rule of the common law was that no party to the record could be a witness for or against himself, or for or against any other party to the suit. 1 *Greenl. Ev.* §§ 329, 330. This doctrine was attacked by Bentham in his work on Evidence, published in 1828, with great force of reasoning. He maintained that "in the character of *competency* no objections ought to be allowed." *Vol. i. p. 3.*

"His views produced a deep impression in England, and became the subject of earnest discussion there. Subsequently they bore fruit. In 'the County Courts Act,' passed by parliament in 1846, it was declared that 'on the hearing or trial of any action, or on any other proceeding under this act, the parties thereto, their wives, and all other persons may be examined either on behalf of the plaintiff or defendant, upon oath or solemn affirmation.' This was a great alteration in the law from what it was before. After it had been tested for six years in the county courts and its

be admissibility, — *i. e.* when the lips of one party to a contract are closed by death, then the other party should not be

wisdom approved, the rule was, in 1851, by a measure known as 'Lord Brougham's Act,' with a few exceptions not necessary to be stated, made applicable in all legal proceedings elsewhere.

"An able writer says: 'Every eminent lawyer in Westminster Hall will readily admit that it has been productive of highly beneficial results.' He adds: 'In courts of law it has not only enabled very many honest persons to establish just claims which, under the old system of exclusion, could never have been brought to trial with any hope of success, but it has deterred at least an equal number of dishonest men from attempting on the one hand to enforce a dishonest demand, and on the other to set up a fictitious defence.'

"The common law commissioners, in their report upon the subject, said: 'According to the concurrent testimony of the bench, the profession and the public, the new law is found to work admirably and to contribute in an eminent degree to the administration of justice.' 2 Taylor's Ev. 1088.

"The innovation, it is believed, has been adopted in some form in most, if not in all, the states and territories of our Union. 1 Greenl. Ev. § 329. It is eminently remedial, and the language in which it is couched should be construed accordingly. A doubt has been suggested whether the enactment before us does not give merely a privilege to each party which may be availed of or not as a matter of choice, without conferring the right upon either to compel the other to testify. This view is too narrow and cannot be maintained. The first sentence forbids, in the courts of the United States, exclusion in any case

on account of color, and in civil actions on account of interest or being a party. If either party offers to testify and is excluded by reason of being a party, there is certainly a clear infraction of the statute, both as to its language and meaning. If either party calls the other, and the party called is excluded upon this ground, is not the infraction equally clear? The language applies as well to one case as to the other. Both are alike within its terms and meaning. We see no ground for a distinction. A doubt, the converse of the one suggested, might with equal propriety be insisted upon. Such a proposition would have the same foundation, and might be sustained by an argument, *mutatis mutandis*, in the same terms. The same doubt and the same reasoning would apply as to colored witnesses. All such doubts rest upon an assumption unwarranted by anything in the statute. The case is one where the language is so clear and comprehensive that there is no room for construction, and the duty of the court is simply to give it effect according to the plain import of the words. There should be no construction where there is nothing to construe. *United States v. Wiltberger*, 5 Wheat. 76. But if there were doubt upon the subject, the statute being remedial in its character, the doubt should be resolved in a liberal spirit, in order to obviate as far as possible the existing evils. To permit parties to testify, and to limit the statute to this, would deprive it of half its efficacy, and that much the most beneficial part. Where the testimony of one party is important to the other, there is, of course, unwillingness to give it. The narrow construction suggested would leave to the

heard as a witness. It has been argued that if this reason be sufficient, it would prevent all suits against executors and administrators, because if the inability to explain be a ground for the exclusion of adverse testimony in one case, it is a ground for the exclusion of such testimony in all. But whatever is the force of this criticism, the exception exists, and the courts have united in effectuating it so far as to silence one party as a witness as to mutual dealings concerning which the other party is unable to speak.¹ While such, however, is the policy of the statutes, there is some diversity in the terms in which this policy is expressed. In one class of statutes, of which that of New York may be taken as the representative, the *object* of the suits is used to define the exclusion, and it is provided that in respect to contracts with a deceased person the surviving contractor shall not be admissible. In others, as is the case in Massachusetts and

party needing the evidence in such cases no choice but to forego it, or fall back upon a bill of discovery. It is hardly credible that Congress, in departing from the long established restriction as to parties to the record, intended to stop short of giving the full measure of relief. We can see no reason for such a limitation. The purpose of the act in making the parties competent was, except as to those named in the proviso, to put them upon a footing of equality with other witnesses, — all to be admissible to testify for themselves and compellable to testify for the others.”

¹ *Eslava v. Mazange*, 1 Woods, 623; *Kelton v. Hill*, 59 Me. 259; *Walker v. Taylor*, 43 Vt. 612; *Morse v. Low*, 44 Vt. 561; *Wood v. Shurtleff*, 46 Vt. 325; *Brooks v. Tarbell*, 103 Mass. 496; *Strong v. Dean*, 55 Barb. 337; *Resseguie v. Mason*, 58 Barb. 99; *Elmore v. Jaques*, 4 Thomp. & C. 679; *Walker v. Hill*, 21 N. J. Eq. 191; *Karns v. Tanner*, 66 Penn. St. 297; *Craig v. Brendel*, 69 Penn. St. 153; *Hanna v. Wray*, 77 Penn. St. 29; *Downes v. R. R.* 37 Md. 100; *Field v. Brown*, 24 Grat. 74; *Reed v. Reed*,

30 Ind. 313; *Bishop v. Welch*, 35 Ind. 521; *Noble v. Withers*, 36 Ind. 193; *Skillen v. Skillen*, 41 Ind. 260; *Hoadley v. Hadley*, 48 Ind. 452; *Goodwin v. Goodwin*, 48 Ind. 452; *Hodgson v. Jeffries*, 52 Ind. 234; *Donlevy v. Montgomery*, 66 Ill. 227; *Keech v. Cowles*, 34 Iowa, 259; *Koenig v. Katz*, 37 Wisc. 153; *Whitesides v. Green*, 64 N. C. 307; *Isler v. Dewey*, 67 N. C. 93; *Howerton v. Lattimer*, 68 N. C. 370; *Guery v. Kinsler*, 3 S. C. 423; *Latimer v. Sayre*, 45 Ga. 468; *Veal v. Veal*, 45 Ga. 511; *Graham v. Howell*, 50 Ga. 203; *Dixon v. Edwards*, 48 Ga. 142; *Waldman v. Crommelin*, 46 Ala. 580; *Stallings v. Hinson*, 49 Ala. 92; *Key v. Jones*, 52 Ala. 238; *Witherspoon v. Blewett*, 47 Miss. 570; *Reinhardt v. Evans*, 48 Miss. 230; *Kellogg v. Malin*, 62 Mo. 429; *Lawhorn v. Carter*, 11 Bush, 7; *Hook v. Bixby*, 13 Kans. 164. See *Davis v. Plymouth*, 45 Vt. 492, where it was held that, on a petition by a woman's guardian to annul her marriage to a deceased man, on the ground that her consent was obtained by fraud, she is not a competent witness.

Pennsylvania, and other states, the *parties* are described, it being enacted that in suits by or against executors, the opposing party shall not be received. Yet even in Pennsylvania we do not find this line exclusively pursued, for, after excluding parties in suits against executors, the statute goes to exclude them in cases “where the assignor of the thing or contract in action may be dead.”¹ Much, however, as the statutes may differ in words, they

¹ In PENNSYLVANIA this peculiarity in the statute is thus exhibited and explained:—

“On the part of the defence Fullerton Parker was called as a witness to rebut the plaintiff’s case, and was objected to, and was rejected by the court as incompetent. This is the chief question in the cause, and involves the question of the true meaning of the 1st section of the Act of 15th April, 1869, allowing parties interested to be witnesses. The act reads thus: ‘No interest or policy of law shall exclude a party or person from being a witness in any civil proceeding: Provided, This act shall not alter the law as now declared and practised in the courts of this commonwealth, so as to allow husband and wife to testify against each other, nor counsel to testify to the confidential communication of his client; and this act shall not apply to actions by or against executors, administrators, or guardians, nor where the assignor of the thing or contract in action may be dead, excepting in issues and inquiries *devisavit vel non*, and others respecting the right of such deceased owner between parties claiming such right by devolution on the death of such owner.’ The judge below held that Fullerton Parker was incompetent to testify under that clause of the proviso which declared that the act shall not apply ‘where the assignor of the thing or contract in action may be dead.’ This clause con-

templates two things: the first, that the deceased party shall be the assignor of a thing or contract; the second, that this thing or contract shall be the subject of the action. In a precise sense, then, James P. Tanner, the deceased lessee of the premises, is not the assignor of Frances E. Tanner, for he was dead before his title passed; and it was passed by a sheriff’s sale by act of the law. He, therefore, did not assign. Again, the thing in action is the right to the possession of the premises leased, this being an action of ejectment, and the contract under which this right arises is the lease from Parker to Tanner. In that lease Parker is the lessor, and may be said to be the assignor to Tanner, of the thing in action, and Parker is alive. As assignor to Tanner, he seems literally not to be within the prohibition of the proviso. But is this the true meaning of the proviso? We think not. In giving to this law a proper interpretation we must recur to the evil intended to be remedied. *Post v. Avery*, 5 W. & S. 509, overturning *Steele v. Phoenix Ins. Co.* 3 Binn. 306, established the rule that a party making an assignment of his interest in the subject of the suit, to enable himself to testify for his assignee, is incompetent as a witness. This was confined to assignments termed merely colorable; but it led the way to a vast train of decisions, some of which went beyond the original case.

“Thus in *Graves v. Gridlin*, 7 Har-

are the same in purpose. That purpose is to provide that when one of the parties to a litigated obligation is silenced by death, the others shall be silenced by law.

ris, 176, a party to a contract, not the note in suit, and he not a party to the action, assigned his interest in the contract, and was then offered by the defendants to prove that the plaintiffs had agreed that the note in suit should be applied in payment of his contract. It was held that, by the doctrine of *Post v. Avery*, and its successors, he was incompetent; Woodward, J., saying, 'Though not a party to the record, he should have been excluded, whether his assignment was real or fictitious.'

"So it was held in *Irwin v. Shumaker*, 4 Barr, 199, that a co-defendant, who was a certified bankrupt, as to whom a *nolle prosequi* was entered, and who executed a release of any surplus to his assignee in bankruptcy, was incompetent on the score of policy. Other cases lie in these lines of decision, and hence it was said in *Cambria Iron Co. v. Tomb*, 12 Wright, 394, that a party to the record is incompetent as a witness on the ground of policy has become too firmly fixed to be changed as a rule of practice, except by legislation. Many attempts were made to apply this remedy, but all failed, until the Act of 1869 was passed. That act laid the axe to the root of the evil, by declaring that no interest or policy of law shall exclude a party or person from being a witness in any civil proceeding. This was sweeping language, and was intended to reach every imaginable case. But the legislature knew that there were some exceptions that must be allowed, otherwise the law could not stand, for it would run counter to interests so sacred, and policy so clear, that public sentiment would not tolerate their

sacrifice. The proviso, therefore, followed, which was evidently the product of two thoughts: one that there were certain confidential relations to be protected against compulsory disclosure; the other that there were certain cases of inequality, where it would be unjust to open a door to one party that was closed by necessity against the other. Hence the proviso declared that husband and wife should not be permitted to testify against each other; nor counsel to testify to the confidential communications of his client. This belongs to the first thought, the confidential relation. It then declared that the act should not apply to actions by or against executors, administrators, or guardians, nor where the assignor of the thing or contract in action may be dead. This, evidently, came from the second thought, as to the inequality of the parties. Where one of two parties to a transaction is dead, the survivor and the party representing the deceased party stand on an unequal footing as to a knowledge of the transaction occurring in the lifetime of the deceased. The enacting clause had opened the lips of all parties; but when death came it closed the lips of one, and even-handed justice required the mouths of both to be sealed. In regard to one class we easily comprehend that a survivor ought not to be permitted to testify against the executor or administrator of his adversary; but as to the other class in the same clause, we do not so readily perceive what assignor it is, who, being dead, the proviso closes the mouth of the survivor. *Evidently it is the true purpose of the proviso to close the mouth of*

§ 467. The exception has been the more cordially recognized from the fact that it rests on a principle which courts of equity concur in accepting.¹ Thus, a pecuniary demand against the estate of a deceased person will not be considered as established by the oath of the person

Exception based on English equity practice.

him who is adversary to the deceased assignor. Here the current of former decisions tends to elucidate the meaning of the legislature. If, therefore, the holder of a note, bond, or other contract should assign his interest to another, he was held to be incompetent to support the claim by his testimony against the opposite party in the instrument or contract. Hence, although he had been stripped of all apparent interest by his assignment, or by the operation of the bankrupt law, yet he could not testify against the adverse party. One of the reasons given by Woodward, J., in *Graves v. Griffin*, supra, is, that whilst one of the parties to a contract in litigation, the policy of the law is to close the mouth of the other, and this, whether it relates to a claim of a plaintiff, or a set-off of a defendant. The true spirit of the proviso, then, seems to be, that when a party to a thing or contract in action is dead, and his rights have passed, either by his own act or by that of the law, to another who represents his interests in the subject of controversy, the surviving party to that subject shall not testify to matters occurring in the lifetime of the adverse party, whose lips are now closed.

“This intent is gathered also from the coupling of the provision for the assignor who is dead, with the provision for the case of an executor or

administrator, evidencing that the legislature looked upon both cases as precisely alike. Another clue to the meaning is found in the exception to the proviso found in the last clause ; excepting all ‘issues and inquiries of *devisavit vel non* and others respecting the right of such deceased owner between parties claiming such right by devolution on the death of such owner.’ Thus, parties claiming under the same decedent, by the mere operation of the law devolving the estate upon them, as by descent or succession, are exempted from the prohibition of the proviso, in contrast to those who stand in adversary relation by reason of a subject of contract, one side of which has come from one of the original parties to the disputed subject.

“The true intent of the legislature is further developed by the Act of 9th April, 1870, declaring that ‘in all actions or civil proceedings in any of the courts of this commonwealth, brought by or against executors, administrators, or guardians, or in actions where the assignor of the thing or contract in action may be dead, no interest or policy of law shall exclude any party to the record from testifying to matters occurring since the death of the person whose estate, through a legal representative, is a party to the record.’ Here the terms, ‘since the death of the person whose estate, through a legal representative, is a party to the record,’ are striking, for both classes

¹ *Down v. Ellis*, 35 Beav. 578 ; *Grant v. Grant*, 34 Beav. 623 ; *Nunn v. Fabian*, 35 L.J. Ch. 140 ; *Hartford*

v. Power, L. R. 3 Ch. 602. See, however, as qualifying this, *U.*, falsely called *J.*, *v. J.*, L. R. 1 P. & D. 461.

making such claim, unsupported by any other evidence.¹ Of evi-

are linked together in the same clause, and the terms, through a legal representative, applied to the case of a deceased assignor, as well as to the case of an executor or administrator, evincing the intention of the legislature not to confine the term assignor to one who has by his own act merely transferred his title, but rather to treat the correlative term assignee just as the term assignees is oftentimes used, in a broad sense, including any one taking title by a sheriff's sale, an orphans' court sale, or even a devise under a will. Thus in the present case, though Tanner died without making an assignment himself, yet he and Parker were the parties to the contest arising upon the lease, — a contest now between Mrs. Tanner and Karns & Co. Mrs. Tanner now represents that side of the controversy which her deceased husband, and predecessor in the title, once represented. Parker is the survivor of the parties to that controversy, and liable to his second lessees on his covenants in his lease, as well as entitled to one eighth of the oil to be derived from it. If he be admitted to testify to matters occurring in the lifetime of Tanner, between him and Tanner, it is obvious the very case in the view of the legislature would arise, and he would hold a position of advantage which would be unfair to Mrs. Tanner, who knows nothing of the transaction between them, and must therefore suffer from any one-sided narration he might give. We think the court committed no error in excluding Parker as a witness." Agnew, J., *Karns v. Tanner*, 66 Penn. St. 303.

Hence, under the Pennsylvania stat-

ute, it is held that where by the death of one of two defendants the plaintiff is made incompetent, the surviving defendant cannot testify. "When one of the parties to a contract in litigation is denied the privilege of testifying, the policy of the law is to close the mouth of the other. *Graves v. Griffin*, 19 Penn. St. 176. This doctrine was recognized prior to 1869, and is the true principle to apply to the construction of this act." *Karns v. Tanner*, 66 Penn. St. 297; *Pattison v. Armstrong*, 74 Penn. St. 476; *Crouse v. Stanley*, 3 Weekly Notes, 83.

The term "action," in the statute, is to be extended so as to embrace all phases of litigation. "It is clear," so it is said by Williams, J., in developing this view, "that the appellant was not admissible as a witness in support of his own claim as a creditor of the estate of his deceased wife, unless he was rendered competent by the Act of 15th April, 1869. That act declares that 'no interest nor policy of law shall exclude a party or person from being witness in any civil proceeding: Provided, this act shall not alter the law as now declared and practised in the courts of this commonwealth, so as to allow husband and wife to testify against each other, nor counsel to testify to the confidential communication of his client; and this act shall not apply to actions by or against executors, administrators, or guardians, nor where the assignor of the thing or contract in action may be dead, excepting in issues and inquiries *devisavit vel non* and others, respecting the right of such deceased owner, between parties claiming such right by devolution on the death of such owner.' If, under

¹ *Poole v. Foxwell*, 13 W. R. 199; cf. *Morley v. Finney*, 18 W. R. 490; *Browne v. Collins*, 21 W. R. 222.

dence of this class, it has been remarked by James, L. J.,¹ “even if legally admissible for any purpose, the interests of mankind im-

the first clause of the proviso, the husband would not be a competent witness in support of his claim against the wife, if she were living, why should he be a competent witness in support of his claim against her estate, now that she is dead? There would seem to be a greater reason for his exclusion in the latter than in the former case. As the law was ‘declared and practised in the courts of this commonwealth’ at the date of the passage of the act, the husband could not have been examined as a witness in support of his claim against his wife, whether she were living or dead. Manifestly it was not the purpose of the act to open the lips of one party while those of the other were closed. This is abundantly evident from the provision that ‘this act shall not apply to actions by or against executors, administrators, or guardians.’ But it is said that this proceeding, for the distribution of the deceased wife’s estate, is not an action, and is, therefore, excluded from the operation of the proviso, and embraced within the enacting provisions of the statute, which declare that ‘no interest nor policy of law shall exclude a party or person from being a witness in any civil proceeding.’ But to give such a construction to this clause of the proviso would be adhering to the letter and rejecting the spirit and reason of the provision, *Qui haeret in litera haeret in cortice*. He who considers merely the letter of the enactment goes but skin-deep into its meaning. That the term ‘actions,’ as used in the proviso, was intended to embrace all civil proceedings, of whatever kind, is evident from the supplement of the 9th of

April, 1870, which declares that ‘in all actions or civil proceedings in any of the courts of this commonwealth, brought by or against executors, administrators, or guardians, or in actions where the assignor of the thing or contract in action may be dead, no interest or policy of law shall exclude any party to the record from testifying to matters occurring since the death of the person, whose estate, through a legal representative, is a party to the record.’

“The purpose of the supplement is obvious. It was intended to permit a party who would otherwise have been excluded by the proviso in the original act, to testify to matters occurring since the death of the person whose estate, through a legal representative, is a party to the record. And it shows that, in the legislative understanding, the word ‘actions,’ as used in the proviso, was intended to embrace civil proceedings, whatever their form, as well as actions technically so called. If this was not the intention and understanding of the law-making power, why were ‘issues and inquiries *devisavit vel non*,’ &c., excepted from the ‘actions’ to which it was declared that the act should not apply? Besides a suit or action, according to its legal definition, is the lawful demand of one’s right in a court of justice: *Jus prosequendi in judicio quod alicui debetur*. 3 Black. Com. 116. This definition is broad enough to include the proceeding in this case. The orphans’ court was, therefore, clearly right in dismissing the exception to the auditor’s report because of his refusal to permit the appellant to testify in support of his own claim.” Wil-

¹ *Hill v. Wilson*, L. R. 8 Ch. 900; 42 L. J. Ch. 817.

peratively require that unless corroborated it should be wholly disregarded. Nobody would be safe in respect of his pecuniary

liams, J., McBride's Appeal, 72 Penn. St. 482.

Under the Pennsylvania statute it is also ruled that in an issue, *devisavit vel non*, the executor, who is also a devisee, is a competent witness in support of the will.

"The first error assigned is as to the competency of the party to testify. He was both a devisee and the executor. It was admitted upon the argument, that if he had been the executor only, he would have been competent under the exception to the proviso of the Act of 15th April, 1869, Pamph. L. 30; but inasmuch as he was a devisee also, it was argued that he was incompetent. We are not able to see the force of the reasoning nor to adopt the conclusion. The language of the exception to the act is to make parties competent 'in issues and inquiries *devisavit vel non* and others, respecting the right of such deceased owner, between parties claiming such right by devolution on the death of such owner.'

"This is an issue *devisavit vel non*. It is between parties claiming a right by devolution on the death of the former owner. The subject matter is respecting the right so acquired. Thus the form of the suit, the parties thereto, and the subject matter, bring it within the exception. We see nothing in it to exclude a party who is either devisee or executor only. A union of two conditions of competency, each unquestioned by itself, will not create incompetency as its joint product. It follows that both parties claiming an estate, under the same decedent, which has devolved on them by descent or succession, are competent witnesses in the trial of an issue to settle their respective rights thereto. *Karns v. Tan-*

ner, 16 P. F. Smith, 297." *Mercur, J., Bowen v. Goranflo*, 73 Penn. St. 357, 358.

On the other hand, under the same statute, a distributee is not a competent witness in the distribution of a decedent's estate as to transactions in his lifetime.

"The first assignment is the refusal to permit the appellant to testify in his own behalf. His object was to relieve himself from a portion of the claim of the estate of the intestate against him. He sought to testify to transactions which occurred during the life of the decedent. That mutuality or equality did not then exist between the parties, which is necessary to permit a party to testify in his own behalf. The parties are not within the proviso to the first section of the Act of 15th April, 1869. The appellant was, therefore, rightfully excluded. *Karns v. Tanner*, 16 P. F. Smith, 297." *Mercur, J., Eshleman's Appeal*, 74 Penn. St. 42, 48.

It has been further held in the same state, that where one partner is dead, in a suit against the survivor for a claim against the firm, the plaintiff is not a competent witness, under the Act of April 15, 1869. *Hanna v. Wray*, 77 Penn. St. 27.

"There is but one question," said Agnew, C. J., "which we need consider, — the competency of Robert Wray as a witness in his own behalf. He was called and permitted to prove a transaction, and the conversations between himself and Ira B. McVay, the deceased partner of the defendant. The case turned upon the special arrangement, relating to the note out of which the controversy arose, made between himself and McVay. They were the acting parties in the trans-

transactions if legal documents found in his possession at the time of his death, and endeavored to be enforced by his executors, could

action, and when McVay died, the truth, so far as it could be heard from his lips, died with him. Wray, therefore, stood upon a vantage ground, which he had gained by the death of McVay. This brings the case within the true intent and spirit of the exception contained in the Act of 15th April, 1869, and directly within the decision in *Karns v. Tanner*, 16 P. F. Smith, 297. In that case the Act of 1869 was fully and carefully considered, and the interpretation then given to it has since been repeatedly recognized. It was then said that the proviso was the product of two thoughts: one that there were certain confidential relations to be protected against disclosure; the other, that there were cases of inequality where it would be unjust to open a door to one party that was closed by death against the other. In reference to the second class, it was said it was evidently the true purpose of the proviso to close the mouth of him who is the adversary of the deceased assignor.

"The conclusion reached was this, in the language of the opinion: 'The true spirit of the proviso, then, seems to be, that when a party to a thing or contract in action is dead, and his rights have passed, either by his own act or that of the law, to another, who represents his interest in the subject of controversy, the surviving party to that subject shall not testify to matters occurring in the lifetime of the adverse party, whose lips are now closed.' Hence, it was held there that Mrs. Tanner, who became the owner of the estate, the subject of controversy, by a sheriff's sale, after the death of Mr. Tanner, stood in the relation contemplated by the proviso,

and that Mr. Tanner was the deceased assignor within the terms of the law."

In *Rutherford's Estate*, 2 Notes of Cases, 443, it was held that a ward, recently arrived at age, was, under the statute, competent to impeach the testimony of his late guardian.

In *Am. Life Ins. v. Shultz*, 2 Notes of Cases, 665, it was held that in a suit upon a contract made by an agent on behalf of his principal, the death of the agent does not render the other party to the contract incompetent as a witness under the Act of April 15, 1869.

In *Kimble v. Carothers*, 3 Notes of Cases, 88, it was ruled that in an action by the administrator of A. against the administrator of B., to recover funds alleged to belong to A.'s estate, the next of kin of A. are not competent.

"They" (the next of kin), said Sharswood, J., "were directly interested, therefore, that the plaintiff should recover, and prior to the Act of April 15, 1869 (Pamph. L. 30), 'An act allowing parties in interest to be witnesses,' were undoubtedly incompetent. 1 Greenleaf on Evid. § 392, and cases there cited; *Mishler v. Merkle*, 10 Barr, 509. It must have been supposed by the learned court below that the act referred to rendered them competent. But this was an error. The act declares expressly, that it 'shall not apply to actions by or against executors, administrators, or guardians.' It can make no difference that both plaintiff and defendant are administrators. Even looking beyond the letter to the spirit of the act, that a living party shall not be heard to prove a claim against the estate of a decedent, who was also a party to the contract or transaction,

be set aside, or varied, or altered, by the parol evidence of the person who had bound himself.”¹ The English equity rule,

whose lips are now sealed, the admission of these witnesses cannot be sustained.”

Under the peculiar provisions of the same statute it has been determined that the husband or wife of a party to a suit cannot testify against an executor on a contract alleged to have been made with the latter's decedent. “The right of the witnesses to testify is rested on this Act of 1869. It is urged, inasmuch as it declares ‘no interest nor policy of law shall exclude a party or person from being a witness,’ and the witnesses offered not being directly interested in the event of the suit, they cannot be excluded by the policy of the law. Prior to the enactment of this statute, both interest and policy excluded husband and wife from testifying for and against each other.

“We must not overlook the fact that all competency imparted to any witness, by the enacting clause of the first section, is entirely taken away by the proviso, in case an executor is a party to the action. It would be no more clearly in the face of the statute to hold that husband and wife may testify against each other, than that they may testify in their own favor, when an executor is a party to the action, to events which transpired during the life of the testator. Each is prohibited by the same expressive language. The same clause in the enactment made both husband and wife equally competent. The same prohibition in the proviso made them both incompetent to testify in behalf of each other, when an executor is a party.

“The language of the statute requires no acuteness to interpret it. It utters no uncertain sound. Any attempt to define its meaning cannot make it more clear. We have no right to assume the legislature did not intend what they have so distinctly and imperatively declared. We must not search for some occult meaning, as if the language was obscure. We must yield to its language, so clearly expressed, its natural force and effect.

“The subject matter about which the witnesses were called to testify is not within the exception to the proviso. It is not the settlement of a claim of right that passed by devolution of the estate. The incompetency of the witnesses in this case stands as if this act had never been passed.

“When the legislature sought to qualify this statute, as they did by the first section of the Act of 9th April, 1870, they restricted the right of a party to testify, to matters only which occurred after the death of the person, whose estate was represented on the trial.

“The conclusion to which we have arrived is sustained by *Diehl v. Emig*, 15 P. F. S. 320. That was an action by a daughter against the executor of her father's will. It was held her husband was not a competent witness to testify to matters occurring in her father's lifetime. It is also in accord with the spirit and reasoning of *Karns v. Tanner*, 16 P. F. Smith, 297, and of *Pattison v. Armstrong et al.* 24 Ibid. 476. It is true, the conclusion to which we have arrived is in conflict with *Dellinger's Appeal*, 21 Ibid. 425; but a more

¹ Powell's Evidence (4th ed.), 53. quoted *supra*.

See *Brown v. Brown*, 48 N. H. 91,

however, receives the evidence of the surviving party when corroborated; our statutes exclude his testimony *in toto* when directed to establish or explain the contract.

careful examination of the act convinces us that due consideration was not then given to its provisos. It may be said, however, that Dellinger's Appeal was not a common law action by or against an executor; but the distribution of a fund in the orphans' court. It was, however, held in McBride's Appeal, 22 Ibid. 480, that the word 'actions,' as used in the proviso, was intended to embrace civil proceedings, whatever their form, as well as actions technically so called. An action is the lawful demand of one's right in a court of justice. So in Gyger's Appeal, 24 Ibid. 48, it was held that a distributee is not a competent witness, in the distribution of a decedent's estate, as to matters occurring in the lifetime of the decedent." *Mercur, J., Taylor v. Kelly, Pittsburg L. J. Ap. 26, 1876; S. C. 3 Notes of Cases, 206; S. P. Stoll v. Weidman, 3 Notes of Cases, 204.*

Where A. leased to B. a brewery and fixtures, stipulating that any improvements or alterations should belong to the lessor at the end of the term, and B. erected a new boiler on the property and assigned the lease to C.; in an action by A.'s executors against C. for the rent, C. having set off the value of the boiler, offered B. to prove a parol variation of the terms of the lease, it was held that B. was a party in interest within the meaning of the Act of 15 April, 1869, and his testimony was inadmissible. *Whitney v. Shippen, 2 Notes of Cases, 470.* "Every vendor of personal property impliedly warrants the title to his vendee. There can be no doubt, therefore, that Thomas J. Martin was an interested witness, and incompe-

tent, unless he was made competent by the Act of April 15, 1869 (Pamph. Laws, 30). But that act expressly declares 'that it shall not apply to actions by or against executors.' The witness was offered to prove a verbal contract with the testator in his lifetime; and, therefore, it cannot be pretended that he was within the exception of the Act of 9th April, 1870 (Pamph. Laws, 44), though the act in words is confined to the case of a party to the record, which the witness in this case was not. We think, therefore, that he was properly rejected." *Williams, J., Ibid.*

In NEW HAMPSHIRE, "by the law of June, 1865, chapter 4074, the court may, in its discretion, permit the parties to testify in such case, only where it is clearly made to appear that actual injustice or fraud will otherwise be done; and it is now well settled that if the transaction about which the testimony of the party is sought was directly between the deceased and the living party, and to which the deceased might have testified if living, the surviving party will not ordinarily be allowed to testify. *Moore v. Taylor, 44 N. H. 374; Chandler v. Davis, Strafford Co. December, 1867; Harvey v. Hilliard, Coos Co. January, 1858.*" *Brown v. Brown, 48 N. H. 91, Bellows, J.* See *Fosgate v. Thompson, 54 N. H. 455.* The exception in the statute cannot be stretched to cases where the opposite party is disabled from testifying by insanity. *Crawford v. Robie, 42 N. H. 162.*

The ILLINOIS statute, which prohibits a party from testifying when the adverse party sues or defends "as

§ 468. Yet the exception, in those statutes which simply exclude proof of communications with deceased persons, does not make the surviving party incompetent, but only precludes him from testifying to communications with the deceased. The witness is competent as to other matters.¹ The test is the nature of the commu-

incompetency restricted to communications with deceased.
 executor, administrator, heir, legatee, or devisee, of a deceased person," has been held to apply to remote as well as to immediate heirs. *Merrill v. Atkin*, 59 Ill. 19.

The NEBRASKA statute is of the same purport. *Wamsley v. Crook*, 3 Neb. 344.

In MASSACHUSETTS, the statute provides that "where an executor or administrator is a party to the suit, the other party shall not be admitted to testify in his own favor, except as to such acts and contracts as have been done or made since the probate of the will, or the appointment of the administrator." This has been held not to prevent the defendant, in an action brought by an administrator *de bonis non*, from testifying to occurrences before the plaintiff's appointment, but after the appointment of the original administrator. *Palmer v. Kellogg*, 11 Gray, 27. See *Lincoln v. Lincoln*, 12 Gray, 45. So, also, virtually, in Vermont. See *Hunter v. Kittredge*, 41 Vt. 359; *Dawson v. Wait*, 41 Vt. 626.

On the construction of the Massachusetts statute we have the following opinions:—

"The defendant Marshall having

deceased, his administrator was summoned in and appeared. The defendants contended that, by the decease of Marshall, the plaintiff became incompetent to testify, and that the master erred in admitting him as a witness. But it is settled that a plaintiff is a competent witness under our statute, notwithstanding the decease of one of several defendants. *Hayward v. French*, 12 Gray, 512; *Brady v. Brady*, 8 Allen, 101." *Chapman, J., Doody v. Pierce*, 9 Allen, 144.

"The provision in Gen. Sts. c. 131, § 14, that parties to a cause may be witnesses, is qualified by the exception that 'where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor; and where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as have been done or made since the probate of the will, or the appointment of the administrator.'

"The St. of 1865, c. 207, § 7, con-

¹ *Kelton v. Hill*, 59 Me. 259; *Smith v. Sergeant*, 4 Thomp. & C. 684; *McFerren v. Mont Alto Co.* 76 Penn. St. 180; *Stonecipher v. Hall*, 64 Ill. 121; *Donlevy v. Montgomery*, 66 Ill. 227; *Campbell v. Mayes*, 38 Iowa, 9; *Wheeler v. Arnold*, 30 Mich. 304; *Twiss v. George*, 33 Mich. 253;

Gray v. Cooper, 65 N. C. 183; *Redman v. Redman*, 70 N. C. 257; *Strickland v. Wynn*, 51 Ga. 600; *O'Neal v. Reynolds*, 42 Ala. 197; *Martin v. Jones*, 59 Mo. 181; *Poe v. Domec*, 54 Mo. 119; *Giles v. Wright*, 26 Ark. 476; *McKean v. Massey*, 9 Kans. 600. See *Willingham v. Smith*, 48 Ga. 580.

nications. Where a surviving party undertakes to testify to per-

tained the further provision, that 'whenever the contract or cause of action in issue and on trial was made or transacted with an agent, the death or insanity of the principal shall not prevent any party to the suit or proceeding from being a witness in the case: provided such agent shall be living and competent to testify.'

"The object and purpose of these exceptions obviously are, to put the two parties to a suit upon terms of substantial equality, in regard to the opportunity of giving testimony. In general, when parties have contracted with each other, each may be supposed to have an equal knowledge of the transaction; and both, if living and of sound mind, are allowed to testify. But if one is precluded from testifying from death or insanity, the other is not entitled to the undue advantage of being a witness in his own case; where, however, a party has contracted through an agent, if the agent is living, the death of the principal does not deprive his personal representative of the testimony of the one most fully acquainted with the facts of the case; and the other party may without injustice be admitted as a witness. Indeed, if he were not, the injustice might be the other way.

"The St. of 1865 must, therefore, be construed as if, instead of saying 'Shall not prevent any party to the suit or proceeding,' it had said, 'Shall not prevent any party to the suit or proceeding who made the contract with the agent.' It could not, we think, have been intended to have any application to the case of a suit by an agent against the representatives of his principal. In the case at bar, an agent sues the administratrix of his principal upon the implied contract of indemnity for acts done in the principal's

service. One party to the contract is dead, and the other cannot be a witness. The exception in St. 1865 is not applicable." Hoar, J., *Brown v. Brightman*, 11 Allen, 227.

"Most of the exceptions relating to the admission and rejection of evidence become immaterial by the finding of the judge in the plaintiff's favor in the matter of the fraud in the original transaction; and of the remaining, only two were relied on in argument. In reference to the refusal to admit the plaintiffs as competent witnesses under the Gen. Sts. c. 131, § 14, it is to be noticed that no decree is sought against the administratrix of Brackett, who is made a defendant; that the only real parties in interest are the plaintiffs and Samuel P. Whitman; that the defendants are not joint parties; and that, as the issue was presented and tried, it was an attempt to impeach the validity of a contract, made with a person since deceased, in the form of a note payable to his order, secured by mortgage, and indorsed by Samuel P. Whitman. It is a case, therefore, where one of the parties to the contract is dead, and the other party, who is also a party to the record, by the provision of the statute is excluded. *Hubbard v. Chapin*, 2 Allen, 328; *Smith v. Smith*, 1 Allen, 231; *Byrne v. McDonald*, *Ibid.* 293." Colt, J., *Richardson v. Brackett*, 101 Mass. 590.

"But the demandant was not a competent witness to prove performance of the condition upon which the deed was given. The deed was the contract in issue and on trial. It constituted the title on which the demandant rested her claim to the premises. The plea puts that title distinctly in issue. The grantor, 'one of the original parties to the contract,' is dead, and the

sonal communications with a deceased party, there such survivor

demandant is 'the other party.' The statute excludes her. St. 1865, c. 207, § 2; *Straw v. Greene*, 14 Allen, 206; *Morony v. O'Laughlin*, 102 Mass. 184. On this ground a new trial must be granted." *Wells, J., Trafton v. Hawes*, 102 Mass. 541.

"The contract in issue and on trial was a promissory note made by Wood to Dresser, and by him indorsed to the plaintiff. Dresser, one of the original parties to that contract, was dead, and Wood, the other party, was therefore rightly not permitted to testify in his own favor. Gen. Sts. c. 131, § 14; *Byrne v. McDonald*, 1 Allen, 293." *Gray, J., Withed v. Wood*, 103 Mass. 564.

The NEW YORK Code of Procedure, § 399, provides that "no party to any action proceeding, *nor any person interested in the event thereof*, nor any person from, through, or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person, at the time of such examination, deceased, insane, or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or committee of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor, or committee shall be examined on his own behalf, or as to which the testimony of such deceased person or lunatic shall be given in evidence."

Under this section it has been held that witnesses as to communications

with the deceased, to be excluded, must be either parties, or must be interested in the result of the suit. Other heirs, not parties, and not interested in a suit brought by an heir at law of a deceased grantor to set aside deeds because of fraud, may testify in such suit as to personal conversations with the deceased. *Hobart v. Hobart*, 62 N. Y. 80.

"Assignee" of deceased, under this statute, includes his grantee. *Mattoon v. Young*, 45 N. Y. 696. But the statute does not apply in favor of an assignee claiming under a transfer made by the deceased prior to the litigated transaction, and having then, as against the deceased, a perfect title. *Cary v. White*, 59 N. Y. 336.

In the same state it is further ruled that bare proof of the fact that a conversation was had with a deceased person, without proof of the conversation itself, is not obnoxious to the objection, that it is proof of a transaction or communication within the meaning of section 399 of the Code, unless it may be in a case where the mere fact of a conversation is the material thing to be proved.

"Nor was there any error," said *Church, C. J.*, "committed on the trial. The question to one of the defendants, whether he had a conversation with the deceased partner, *Schnauber*, in relation to selling *Hoyt* tobacco, was not obnoxious to the objection that it called 'for a transaction or communication between defendant and a deceased person.' The fact of having a communication was not a transaction within the meaning of the Code, nor was it a communication. The referee sustained the objection to the question calling for the conversation, and allowed the witness to state only the fact that he had

is incompetent, no matter what is the technical character of the

one. Although such a question is upon the threshold of forbidden ground, I do not think it violates the statute, unless, perhaps, in a case where the mere fact of a conversation is the material fact to be proved. The communication made was the important fact in this case, and the circumstance that a conversation was had was immaterial, and no more important than would be the circumstance that the defendant had seen Schnauber on a certain day. Besides, the plaintiffs could not have been injured by the answer. The notice to Schnauber was proved by one witness who was present and heard it, and by Hoyt himself when he purchased the goods, that Schnauber told him he had received the notice, and if there had been no evidence of the conversation itself, the result would not have been changed." *Church, C. J., Hier v. Grant*, 47 N. Y. 280.

The Iowa statute (which is substantially the same as that of New York) is as follows:—

"No party to any action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title, by assignment or otherwise, and no husband or wife of any said party or person shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination, deceased, insane, or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or guardian of such insane person or lunatic. But this prohibition shall not extend to any transaction or com-

munication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor, or guardian shall be examined on his own behalf, or as to which the testimony of such deceased or insane person or lunatic shall be given in evidence."

"Briefly stated," says Day, J., in construing this statute, in *Cannady v. Johnson*, 40 Iowa, 589, "so far as applicable to the present question, this section prescribes the following rule of exclusion: 'No party to an action, or person interested in the event thereof, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination, deceased, against the executor, heir at law, or next of kin of such deceased person.'

"In order to effect the exclusion, the proposed testimony must be against the executor, heir at law, or next of kin. To the existence of this condition it is necessary that the party toward whom the testimony is directed must be in a condition to be affected by it. The testimony is to be excluded when it is offered against such person, that is, when he is a party to the proceeding, and in a condition to be legally affected by it. This being, as we believe, the proper construction of the rule of exclusion embraced in this section, we are prepared to consider the exception which this section engrafts upon it. This prohibition shall not extend to any transaction or communication as to which any such executor, heir at law, or next of kin shall be examined on his own behalf; that is, if an executor, heir at law, or next of kin is a party to an action, and in his own behalf is examined respect-

suit, or who may have been present at the communications.¹

ing any personal transaction or communication between the deceased and the opposite party, or a third person interested in the event of the suit, then such other party or interested person may testify respecting the same transaction or communication.

"This action is against the administrator of W. C. Johnson, deceased. He is the sole party defendant. Against him the plaintiff is not competent, under the rule above named, to testify as to any personal transaction or communication which occurred between plaintiff and the deceased. The fact that the widow of the deceased has testified respecting the settlement of the account, does not open the way for plaintiff to testify respecting such personal transaction and communications."

¹ *Hatch v. Pengnet*, 64 Barb. 189.

"The question of the competency of the plaintiff to testify was settled in *Hayward v. French*, 12 Gray, 459. The death of one of several joint contractors, who are defendants, does not bring the case within the exceptions to the statute, so as to render the other party incompetent. It is only the death of a sole party to a contract or cause of action in issue and on trial, or where several joint promisors are sued, the death of all of them, that operates to exclude the other party from testifying in his own favor." *Bigelow, C. J., Goss v. Austin*, 11 Allen, 526.

Under the Pennsylvania statute we have the following:—

"The next assignment raises the question whether the plaintiff was a competent witness; and if so, whether the facts proposed to be proved by him were material and relevant to the issue? He purchased the lot upon which the trespass is alleged to have

been committed from Bricker, to whom Hughes, by deed dated March 13, 1854, conveyed it, 'reserving, however, the road as it is.'

"By a subsequent deed, dated August 1, 1864, Hughes conveyed the adjoining land, known as 'The Furnace Property,' to the defendants, 'together with all and singular the buildings, improvements, . . . ways, &c., theremto belonging, or in any wise appertaining.' Under this deed the defendants claimed the right to the use of the way or road in question, alleging that it was the road reserved in the deed of Hughes to Bricker. The court rejected the plaintiff as incompetent to prove matters occurring between himself and Hughes, the latter having died before the trial. But was he an incompetent witness for the purpose for which he was offered? He was not called to testify to anything connected with the sale and conveyance of the lot to Bricker, upon which the trespass is alleged to have been committed, or in relation to the sale and conveyance of the Furnace Property to the defendants, under which the right of way is claimed. He was offered for the purpose of proving matters having no connection with either conveyance. He purchased from Hughes a lot containing nine acres, adjoining the one sold to Bricker. Why was he not competent to prove that there was a road through 'the nine acre lot?' That there was such a road, and that its location was changed, were facts independent of the deed for the lot, and wholly unconnected with the contracts between Hughes and Bricker, and Hughes and defendants, which are involved in this action; facts which, if not true, could be disproved by persons in the neighborhood as readily as by Hughes him-

Whether the exception touches cases in which the evidence is documentary, is doubtful. But it has been held that when the

self, if he were living. Why, then, should the plaintiff's mouth be closed in regard to these matters, if Hughes was dead? and if not, why was he not equally competent to prove that, when Hughes tendered the deed for the lot, it contained a reservation of the road, and that he refused to accept it, and then Hughes had the reservation erased? The defendants were not claiming a road through 'the nine acre lot.' Why, then, was the plaintiff not competent to prove the facts for which he was offered? It is no answer to say that he was not competent because Hughes was dead. The act, allowing parties interested to be witnesses, rendered him a competent witness, unless he is disqualified by the proviso which declares that the act shall not apply 'where the assignor of the thing or contract in action is dead.' If, in legal contemplation, Hughes is to be regarded as the assignor of the alleged right of way over 'Bricker lot,' the plaintiff was not a party to the transaction, nor was he called to testify anything concerning it. Surely the proviso was not intended to exclude parties from being witnesses, where the assignor of the thing or contract in action is dead, if they were not parties to the transaction, and are not called to testify to anything that took place between themselves and the deceased assignor. If it was, then no party claiming title through or under a deceased grantor, however remote the conveyance, can be a witness where the land, or some estate in it, is the subject of the action. The proviso must have a reasonable interpretation, and it must not be so construed as to defeat the very purpose of the act. It was intended to exclude parties to

the transaction from being witnesses in regard to it, where the opposite party is dead and his rights have become vested in others by his own act or by operation of law. But it never could have been intended to exclude persons who were not parties to the transaction, and who are not called to testify anything respecting it. The plaintiff was, therefore, a competent witness." *Williams, J., McFerren v. Mont Alto Iron Co.* 76 Penn. St. 186.

To the same effect is the following ruling in Michigan : —

"Some questions arose concerning the admissibility of testimony from the plaintiff, about matters claimed to come within the statute precluding him from testifying to what 'must have been equally within the knowledge' of the deceased. C. L. § 5968. Most of the facts sought to be introduced by his testimony related to what was done in the absence of the deceased, including the forwarding and removal of property destined for his use, he being in Texas, and the transactions being confined to occurrences in Michigan, and on the way between the two states. Some testimony referred to the value of property and transportation. These matters could not, for the most part, be known to the deceased at all, and his only information must have been by hearsay. It is not, therefore, necessary to go into any examination of the statute, which cannot possibly apply to such facts." *Campbell, J., Wheeler v. Arnold*, 30 Mich. R. 307.

Under the New York statute, as we have seen, the surviving party may ordinarily prove the fact of a conversation with the deceased, though not its details. *Hier v. Grant*, 47 N. Y. 278.

representatives of the deceased have the means of proving the document by independent evidence, the case is not within the exception.¹

§ 469. The exception does not incapacitate where the suit is against co-defendants of whom only one is dead, when the contract was made either with the living co-defendants, or with the living and the dead concurrently.² So when the deceased contracting party was represented in the bargain by an agent who is capable of testifying, then the other contracting party, unless expressly excluded by statute, may be a witness.³ Under those statutes which confine the exception to suits against executors, &c., the death of an agent of one party, through whom the contract was made, does not prevent the surviving party from testifying to

In the same state it is held that the exception does not preclude a party from testifying to statements made by a deceased person to a third party; and this is so although the witness participated in the conversation, so long as his testimony is limited to what was not personal between him and the deceased; nor does the fact that the third person was the counsel of the deceased affect the legality of the testimony. *Church, C. J.*, and *Allen, J.*, dissenting. *Cary v. White*, 52 N. Y. 138.

"The fact that another person is competent to speak goes far to take the case out of the substantial reason of the statute, and it does not fall within its letter. It is neither personal transaction nor communication between the witness and the party deceased, and these alone cannot be proved by the testimony of a party. Under the existing laws, the rule is that a party is competent as a witness. His exclusion is to be made out by the party alleging his incompetency as to any particular matter. *Simmons v. Sisson*, 26 N. Y. 277, and *Lobdell v. Lobdell*, 36 *Ibid.* 333, 334, sustain the views above expressed. It must, we

think, be regarded as settled, under the present provision of the Code, that the three hundred and ninety-ninth section does not preclude a party from testifying to the statements of a person deceased, made to a third person in the hearing of the witness." *Johnson, J.*, *Cary v. White*, 52 N. Y. 139.

¹ *Moulton v. Mason*, 21 Mich. 364. See *Thurman v. Mosher*, 3 *Thomp. & C.* 583; 1 *Hun*, 344; but see *supra*, § 467

² *Hayward v. French*, 16 *Gray*, 512; *Doody v. Pierce*, 9 *Allen*, 144; *Hubbell v. Hubbell*, 22 *Oh. St.* 208; *Hall v. State*, 39 *Ind.* 301; *Gavin v. Buckles*, 41 *Ind.* 528; *Isenhour v. State*, 64 *N. C.* 640; *Brower v. Hughes*, 64 *N. C.* 642; *Leaptrot v. Robertson*, 37 *Ga.* 586; *McGehee v. Jones*, 41 *Ga.* 123; *Graham v. Howell*, 50 *Ga.* 203; *Payne v. Elyea*, 50 *Ga.* 395; *North Ga. Mining Co. v. Latimer*, 51 *Ga.* 47.

³ *Brown v. Brightman*, 11 *Allen*, 227, cited *supra*; *Hildebrant v. Crawford*, 6 *Lans.* 502; *Payne v. Elyea*, 50 *Ga.* 395; *Jacquin v. Davidson*, 49 *Ill.* 82; though see *Spencer v. Trafford*, 42 *Md.* 1; *Mumm v. Owens*, 2 *Dill.* 475.

the contract.¹ But under statutes which exclude the surviving party to a contract, the death of a contracting agent excludes the surviving party who contracted with him.²

§ 470. The conflict must be really between the dead, whose mouth is closed, and the living, who is able to speak, in order to enable the statute to apply.³ Consequently when a third party interposes a claim to property on which a *fi. fa.* has been levied, the execution plaintiff is ordinarily a competent witness on the trial of the issue, though the execution defendant is dead.⁴ So in an action by a widow against an alleged fraudulent grantee of her husband, she may testify as to conversations with the defendant;⁵ nor does the exception, in questions concerning the validity of a will, affect the relations of the beneficiaries.⁶

§ 471. The administrator or executor of the deceased party is competent, though the other contracting party is, under the statute, incompetent.⁷ But the exception has been ruled not to exclude administrators in suits against administrators.⁸ In Pennsylvania, however, it is held that when one party is excluded by statute the other is excluded by the policy of the law.⁹

§ 472. It has been held that the exception excludes a partner, in a suit brought by him to obtain an account against the firm, when a deceased partner's executors are parties to the cause.¹⁰ On the other hand, it has been said that the exception does not

Exception does not cover intervening interests.

Exception does not exclude administrator from testifying in his own behalf.

¹ Am. Life Ins. Co. v. Shultz, 2 Weekly Notes of Cases (Penn.), 665.

² First Nat. Bk. v. Wood, 26 Wise. 500; McNab v. Stewart, 12 Minn. 407; Crenshaw v. Robinson, 37 Ga. 18.

³ Downs v. Belden, 46 Vt. 674; Pattison v. Armstrong, 74 Penn. St. 476.

⁴ Anderson v. Wilson, 45 Ga. 25. See Onzts v. Seabrook, 47 Ga. 359.

⁵ Sanborn v. Lang, 41 Md. 107.

⁶ Garvin v. Williams, 50 Mo. 206.

⁷ Howe v. Merriek, 11 Gray, 129; McIntyre v. Meldrim, 40 Ga. 490. See Stearns v. Wright, 51 N. H. 600. In New Hampshire it has been ruled that if an administrator testifies, this ena-

bles the opposite party to testify, even as to communications with the deceased. Ballou v. Tilton, 52 N. H. 605.

⁸ Stearns v. Wright, 51 N. H. 606.

⁹ Karns v. Tanner, 66 Penn. St. 297; Pattison v. Armstrong, 74 Penn. St. 476; Crouse v. Staley, 3 Weekly Notes, 83; Kimble v. McBride, 3 Weekly Notes of Cases, 88.

¹⁰ McKaig v. Hebb, 42 Md. 227. In Vermont and Massachusetts the statute does not exclude in any cases against surviving partners or co-contractors. Reed v. Sturtevant, 40 Vt. 521; Hayward v. French, 12 Gray, 453; Goss v. Austin, 11 Allen, 525.

preclude a suit by a surviving partner against the partnership, to recover a debt due him by the partnership; the suit not being against an executor or administrator.¹ The question, in this case, depends upon the structure of the local statute.

§ 473. The exception, it has been ruled, relates only to persons who are parties to the issue on trial, and not to those who were simply technical parties to the original contract.² Nor does it exclude the children of the contracting party.³ But a real, who is not a nominal party to the record, is excluded by the exception.⁴ In Alabama it has been held by a majority of the supreme court,⁵ that under the exception, the transferrer or assignor of the claim sued on by the plaintiff is as inadmissible as would be the plaintiff himself.⁶

Does not relate to transaction after death of deceased. § 474. Unless the exception expressly covers all suits against administrators, it does not exclude the plaintiff from proving matters occurring since the decease of the party of whom the defendant is executor.⁷

¹ *Bragg v. Clark*, 50 Ala. 363.

² *Hamilton v. R. R.* 10 R. I. 538; *Looker v. Davis*, 47 Mo. 140; *Willingham v. Smith*, 48 Ga. 580. But see, *contra*, *Blood v. Fairbanks*, 50 Cal. 420.

³ *Anderson v. Hance*, 49 Mo. 159.

⁴ *Stallings v. Hinson*, 49 Ala. 92; *McBride's Appeal*, 72 Penn. St. 482; *Eshleman's Appeal*, 74 Penn. St. 42.

⁵ *Peters, J.*, dissenting.

⁶ *Louis v. Easton*, 50 Ala. 470.

⁷ *Brown v. Brown*, 48 N. H. 90; *Cousins v. Jackson*, 52 Ala. 262; *Witherspoon v. Blewett*, 47 Miss. 570; *Poe v. Domec*, 54 Mo. 119; *Martin v. Jones*, 59 Mo. 181; *McGlothlin v. Hemry*, 59 Mo. 213.

“The statute provides that ‘No person shall be disqualified as a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same as a party, or otherwise; but such interest

may be shown for the purpose of affecting his credibility; provided, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor,’ &c. It will be seen that all parties are made competent witnesses by this section of the statute, but where one of the parties to a contract in issue is dead, the other party shall not be permitted to testify in his own favor. It was not intended by the statute that in cases consisting of a series of contracts and transactions, each of which were put in issue by the pleadings, some of which transactions had been had with a party who had since died, and others of the transactions had been had with others, or consisted of facts which had taken place since his death, the party living should be excluded from testi-

§ 475. The exception, in statutes where the exclusion relates only to the surviving party in contracts, does not include torts. Hence in a suit for damages against a party for killing plaintiff's husband, the defendant is a competent witness on his own behalf. In such case there is no contract or cause of action to which the deceased was a party, and his death was a *sine qua non* to the existence of the cause of action.¹

Does not extend to suits for injuries causing death.

§ 476. The object of the statutes being to rehabilitate, not incapacitate witnesses, the exception will be held, unless otherwise expressly providing, not to make incom-

Do s not make incompetent

petent to facts occurring since the death of the party to the first transaction. Such an exclusion would be wholly outside of the object and intention of the legislature. The object of the law was to prevent one party from testifying to a contract in issue, where the lips of the other party were closed, so that his version of the contract could not be given; but it could answer no valuable purpose to exclude a party from testifying to facts about which the dead party knew nothing in his lifetime, and which was wholly transacted with others. *Stanton v. Ryan*, 41 Mo. 510." *Poe v. Domec*, 54 Mo. 123, *Vories, J.*

"It has been held by this court, in several cases, that it was not intended by the statute to exclude one party when the other was dead, where the evidence related to transactions had with others and to which the deceased party was no party, and with which he had no knowledge of or connection, or consisted of facts and transactions which had taken place since the death of the deceased party. *Stanton v. Ryan*, 41 Mo. 510; *Looker v. Davis*, 47 Mo. 140; *Poe v. Domec*, 54 Mo. 119." *Martin v. Jones*, 59 Mo. 187. *Vories, J.*

¹ *Entwhistle v. Feighner*, 60 Mo. 214. See, however, *contra*, *Sherlock v. Alling*, 44 Ind. 184.

In Missouri the position in the text is thus vindicated: "The statute (2 Wagn. Stat. p. 1372, § 1) permits parties to testify in suits; 'provided, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor.'

"In the present case there was no contract or cause of action to which the deceased husband was a party. The proviso in the statute was enacted for the purpose of putting parties on an equal footing, and not allowing a living party to give his version of a contract when he could not be confronted by the other party in consequence of death. When the husband was killed, then it was for the first time that the cause of action accrued to the plaintiff as his widow. Had the husband survived, this action never could have been brought. It is an action in which plaintiff and defendant only could be parties, for it did not arise till after the husband's death. The defendant, therefore, was a competent witness, and more especially so in this case, as the plaintiff had the benefit of her husband's declarations, and the court erred in ruling otherwise." *Entwhistle v. Feighner*, 60 Mo. 214, 215, *Wagner, J.*

witness previously competent. petent any witness previously competent.¹ Thus where, prior to the statute, a defendant is competent to testify for his co-defendant, he is not made incompetent, after the statute, by the fact that the suit is against executors.² So the exception in the statute does not prevent a party from testifying, as he could have done before the statute, to his book of original entries.³ So in a contest between creditors and the executors of a creditor of an insolvent's estate, it was held that the insolvent debtor was competent as a witness to prove fraud practised upon him by the executors' testator.⁴

§ 477. Suppose that on the trial of a case, when the parties

¹ See observations of Sharswood, J., in *Am. Life Ins. Co. v. Shultz*, 2 Weekly Notes of Cases, 665.

² "The first assignment raises the question of the competency of Campbell to testify in behalf of his co-defendant in the judgment. The plaintiff being an executor, and the evidence relating to what transpired during the life of his testator, it is contended that the Act of 15th April, 1869, is inapplicable. Prior to this act, the general rule in Pennsylvania undoubtedly was, that a party to the record was incompetent to testify. Generally, a principal debtor is not a competent witness for a surety in an action against the latter. Whenever, however, the suit is ended as to the principal, and the defence made by the surety is personal as to him, as were the facts here, the principal is substantially discharged from the record. Although no regular feigned issue be formed in practice, yet, under the order of court, the trial is in the nature of one and embraces only the parties thereto. Campbell was therefore a competent witness. *Talmage et al. v. Burlingame et al.* 9 Barr, 21. This assignment is not sustained." *Mercur, J., Simpson v. Bovard*, 74 Penn. St. 360.

³ *Leggett v. Glover*, 71 N. C. 211.

See, also, *Kelton v. Hill*, 58 Me. 116; *Barnett v. Steinbach*, 1 Weekly Notes of Cases, 335.

⁴ *Shertz v. Norris*, 2 Weekly Notes, 637.

"The learned judge below considered that the witness Lentz was rendered incompetent under the provisions of the Act of 15th April, 1869 (Pamph. L. 30), entitled 'An act allowing parties in interest to be witnesses.' We think that this was an error. That act was intended as an enlarging statute. No person competent to testify before the passage of the act was rendered thereafter incompetent either by the words or the spirit of the law. Regarding the issue below as an action by executors, the statute declares that it shall not apply in such an action; in other words, that the question of competency or incompetency of witnesses shall remain as if the statute had not been enacted. This was an issue between creditors, to which Lentz was no party, and whatever interest he might have in the question, he could neither gain nor lose by the verdict, nor could it be given in evidence in any subsequent proceeding for or against him. The death of Hanbest could have no effect on the question." *Sharswood, J., Ibid.*

are both living, one of the parties is examined, and subsequently both parties die, can, after death, the testimony of the deceased party be reproduced in a second suit? So far as concerns principle, it ought to be, as the opposite party, living at the time of the giving of the testimony, had the opportunity of explanation.¹ So where on a second trial of a cause involving the same subject matter, but after the form of action had been changed and an administratrix substituted for the deceased plaintiff, the notes of the testimony given by the latter on the former trial, and to be verified by the oath of the judge who tried the cause, were offered in evidence; it was held (reversing the judgment below), that the action did not fall within the proviso to the statute; and that the evidence should have been admitted.² Intermediate incapacitation of a witness, therefore, does not exclude his deposition taken when he was competent.³ But when a deceased party's deposition is put in evidence, the other party being still living, such other party should be admitted as a witness in reply.⁴

§ 478. At common law, as we have seen,⁵ husband and wife cannot testify as against the other to communications received

¹ *Emerson v. Bleakley*, 2 Abb. (N. Y.) App. 22; *Collins v. Smith*, 78 Penn. St. 423; *Mumm v. Owens*, 2 Dill. 475.

² *Evans v. Reed*, 78 Penn. St. 415; *Speyerer v. Bennett*, 3 Weekly Notes of Cases, 213. See *Roberts v. Yarboro*, 41 Tex. 449.

³ *Supra*, § 198.

⁴ *Monroe v. Napier*, 52 Ga. 385. See *Speyerer v. Bennett*, *supra*.

It has been held in Maine, that under the R. S. 1871, c. 82, § 87, the defendant cannot introduce the testimony of the plaintiff's intestate, as given at a previous trial of the action, and then put himself upon the stand as a witness to contradict it. "At a former trial of this cause," said Appleton, C. J., "Ephraim Folsom, the plaintiff's intestate, was a witness. The counsel for the defendant introduced his testimony as then given. Having in-

troduced it, he offered the defendant as a witness to contradict it, but the court ruled his testimony inadmissible. This was correct. The testimony of Folsom at a former trial was offered by the defendant. Having offered it, he did not therefore acquire the right to contradict it. It is sufficient that the evidence was not in the form of a deposition. If it were it may well be doubted whether the adverse party could, within R. S. 1871, c. 82, § 87, offer the deposition of his deceased opponent for the purpose of rendering his own testimony admissible, when otherwise it would not be. The defendant does not bring himself within any of the exceptions in § 87. *Kelton v. Hill*, 59 Me. 259." Appleton, C. J., *Folsom v. Chapman*, 59 Maine, 195.

⁵ *Supra*, § 427.

Statutes do not touch common law privilege of husband and wife.

in their confidential intercourse. This rule is not ordinarily affected by statutes permitting them to testify for or against the other.¹ Nor does the statute as to parties generally affect the common law incapacity of husband and wife.²

§ 479. So far as concerns confidential communications with counsel, a party who offers himself as a witness, and undertakes to answer certain interrogatories cannot, it has been ruled, refuse to answer pertinent cross-questions on the ground that they touch confidential communications from himself to his counsel.³ It is otherwise, however, when the witness

¹ *People v. Reagle*, 60 Barb. 527; *Steen v. State*, 20 Oh. St. 333; *Noble v. Withers*, 36 Ind. 193; *Jackson v. Jackson*, 40 Ga. 150; *Costello v. Costello*, 41 Ga. 613. See *supra*, § 430.

² See cases *supra*, § 430; *Symonds v. Peck*, 10 How. (N. Y.) Pr. 395; *Rich v. Husson*, 4 Sandf. 115. See, as to divorce cases, *Thayer v. Thayer*, 101 Mass. 111; *Winter v. Winter*, 7 Phila. R. 369; *Bronson v. Bronson*, 8 Phila. R. 261; *Mitchinson v. Cross*, 58 Ill. 366; *Stanley v. Stanton*, 36 Ind. 445; and see *Hays v. Hays*, 19 Wisc. 182; *Fugate v. Pierce*, 49 Mo. 441; *Owen v. Brockschmidt*, 54 Mo. 285.

“That it is a rule of the common law, a wife cannot be received as a witness for or against her husband, except in suits between them, or in criminal cases where he is prosecuted for wrong done to her, is not controverted. But it is argued, because Congress has enacted that in civil actions in the courts of the United States there shall be no exclusion of any witness because he is a party to, or interested in, the issue tried, the wife is competent to testify for her husband. Undoubtedly the act of Congress has cut up by the roots all objections to the competency of a witness on account of interest. But the

objection to a wife's testifying on behalf of her husband is not, and never has been, that she has any interest in the issue to which he is a party. It rests solely upon public policy. To that the statute has no application. Accordingly, though statutes similar to the act of Congress exist in many of the states, they have not been held to remove the objection to a wife's competency to testify for or against her husband. And in West Virginia it has been expressly enacted that a husband shall not be examined for or against his wife, nor a wife for or against her husband, except in an action or suit between husband and wife. Were there any doubt respecting the question, this statute would solve it; for the Act of Congress of July 6, 1862, declares that the laws of the state in which the court shall be held shall be the rules of decision as to the competency of witnesses in the courts of the United States.” *Strong, J., Lucas v. Brooks*, 18 Wallace, 452. In Pennsylvania, the party's wife is excluded when he is incompetent. *Stoll v. Weidman*, 3 Notes of Cases, 205; *Taylor v. Kelley*, *Ibid.* 206.

³ *Woburn v. Henshaw*, 101 Mass. 193; *aff. Com. v. Mullen*, 97 Mass. 545.

has not waived his privilege by a partial answer involving the subject matter of his communications.¹

§ 480. A party, it may be generally said, when he becomes a witness is subject to the usual duties, liabilities, and limitations of witnesses.² The statute, for instance, does not affect the rule, that parol evidence cannot be received to vary a written contract.³ So, also, a party may be examined as an expert.⁴ A party when so examined is also subject to the law which authorizes a party's admissions out of court to be used in evidence against him on trial.⁵ His testimony, after his decease, may be reproduced on a future trial, under the same limitations as that of other witnesses.⁶

§ 481. As a general rule, he subjects himself to the same liabilities on cross-examination as other witnesses;⁷ and it is said

¹ *Montgomery v. Pickering*, 116 Mass. 229. See *infra*, § 583.

"The plaintiff became a witness for himself, and testified to material facts. On cross-examination the defendant's counsel asked what statements he made to his attorneys respecting his knowledge, and the purpose of making the deed to Pratt. This was objected to as calling for a privileged communication; and the objection was sustained, and herein is the next error assigned. Our statute (revision of 1860, § 3985; Code of 1873, § 3643) provides that 'no practising attorney . . . shall be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity.' . . . If this question had been asked the attorney, it is clear the objection made should have been sustained; and this, also, at the common law, for the statute is but declarative of the common law; and, at the common law, the party was neither competent nor compellable to testify. Hence such communications were effectually locked at the common law, and could not be revealed at all.

While our statute makes parties both competent and compellable to give evidence, it should not be construed to open the door to a full inquiry into privileged communications." *Cole, J., Barker v. Kuhn*, 38 Iowa, 395. Counsel can set up the privilege, notwithstanding the statute. *Ibid.*; *Brand v. Brand*, 39 How. Pr. 193. *Infra*, § 576.

² *Wheelden v. Wilson*, 44 Me. 11; *Quimby v. Morrill*, 47 Me. 470; *Granger v. Bassett*, 98 Mass. 462; *McDaniels v. Robinson*, 26 Vt. 316; *Cowles v. Bacon*, 21 Conn. 451; *Roberts v. Gee*, 15 Barb. 449; *People v. Russell*, 46 Cal. 121.

³ *Kelly v. Cunningham*, 1 Allen, 473. See *infra*, § 955.

⁴ *Dickenson v. Fitchburg*, 13 Gray, 546.

⁵ *Hall v. The Emily Banning*, 33 Cal. 522.

⁶ *Emerson v. Bleakley*, 2 Abb. (N. Y.) App. 22. See *supra*, §§ 178, 477.

⁷ *Marx v. People*, 63 Barb. (N. Y.) 618; *Fralich v. People*, 65 Barb. (N. Y.) 48; *Varona v. Socarras*, 8 Abb. (N. Y.) Pr. 302; *Anable v. Anable*,

Party open to cross-examination to same extent as other witnesses. may be even cross-examined on the whole case, and not simply on what relates to his examination in chief,¹ though this expansion of the liberty of cross-examination may not be sustained in those states in which strict rules of demarcation in this respect are maintained.²

24 How. (N. Y.) Pr. 92; *Brubacker v. Taylor*, 76 Penn. St. 83; *State v. Horne*, 9 Kans. 119. *Infra*, §§ 527, 955.

¹ *Livingston v. Keech*, 34 N. Y. Sup. Ct. 547. See *Holbrook v. Mix*, 1 E. D. Smith, 154.

² *Malone v. Dougherty*, 79 Penn. St. 46; *S. C. 2 Weekly Notes*, 180, Sup. Ct. of Pennsylvania, May, 1875. In this case Woodward, J., said: "But it does not follow that the evidence was admissible on cross-examination. The suit was on a note given on the 30th of July, 1867. The suspension of payment did not occur until some weeks afterwards. The admission of proof that the plaintiffs had knowledge of it, would have involved the admissibility of proof of the fact of the subsequent suspension itself. And to make these details intelligible, and to show their relevancy to the issue, it would have been necessary to exhaust the knowledge of the witness in relation to the effect on the interests of the defendant which the suspension produced. The whole defence would have been interjected into the case upon the cross-examination of the first witness for the plaintiffs, and the presentation of their rebutting evidence would have been rendered inevitable. By such a method of development the trial of the cause would have been only confused, hampered, and delayed. The evidence could have been offered with perfect safety, on the part of the defendant, in chief. By the second section of the Act of the 15th of April, 1869, Mr. Seiler could have been required to testify 'as if under cross-

examination.' It is not apparent how, by pursuing legitimate forms, the defence would have been subject to any embarrassment, or have incurred the loss of any due advantage. The offers were properly rejected."

The liberty of cross-examination, in this relation, is thus discussed by Bradley, J., in the supreme court of the United States: "As to the exception to the ruling of the court on the admission of evidence in the case. The cross-examination of Hayes was very long, and took a wide range,—much wider than is allowed in United States courts in the case of an ordinary witness, where the cross-examination is usually confined within the scope of the direct examination. *Johnston v. Jones et al.* 1 Black, 216; *Teese et al. v. Huntingdon et al.* 23 Howard, 2. But a greater latitude is undoubtedly allowable in the cross-examination of a party who places himself on the stand than in that of other witnesses. Still, where the cross-examination is directed to matters not inquired about in the principal examination, its course and extent is very largely subject to the control of the court in the exercise of a sound discretion; and the exercise of that discretion is not reviewable on a writ of error. That was precisely the case here. The witness, on his cross-examination, having stated that he was worth \$45,000 at a period some four years prior to the purchase of the goods, was asked how he had acquired that sum. As to a portion of it he stated that he had advanced money to a friend to buy up government vouch-

Under the Pennsylvania statute, when one party calls another, the party calling is not concluded by the answers of the party called. It has been held under that statute that a party thus examined may be impeached, by showing that he made contradictory statements out of court, without first asking him as to such statements.¹

§ 482. Ordinarily, as is elsewhere seen, a witness cannot be examined as to another person's motives. It is otherwise with a witness's own motives, as to which he is always open either to examination or cross-examination. Hence a party, when examined as a witness, may be asked — so has it been held in Maine and Massachusetts — as to his own motives or intentions, when these are material.² In New York we have

May be examined as to his motives.

ers on speculation upon shares. Being asked to name this friend he declined, and the court refused to compel him to disclose it. This refusal was excepted to. We think it was entirely in the discretion of the court to compel an answer or not. It was on a new matter first introduced on the cross-examination. If a court did not possess discretionary power to control such a course of examination, trials might be rendered interminable." *Bradley, J., Rea v. Missouri*, 17 Wall. 542.

¹ "Under the second section of the Act of Assembly of April 15, 1869, Pamph. L. 30, when the plaintiff below was called to the stand as a witness by the defendants, they had a right to examine her as if under cross-examination — put to her leading questions — and draw from her any facts or admissions which would corroborate their own case or weaken hers. The act provides that 'the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony.' It is evident that she was to be considered in all respects as if originally offered and examined as a witness in her own behalf. We think it clear, then, that the

questions overruled by the learned court, and which form the subject of the first three assignments of error, were entirely proper. The answers would either have corroborated the testimony of Mrs. Hauck, the witness examined by the defendants, or if desired, Mr. and Mrs. Spielman could have been called to contradict her. If she had really made such admissions, Mrs. Taylor would have had the opportunity of explaining how she came to make them. To this she surely had no right to object. It was not the case of contradicting and discrediting an ordinary witness in a material point, by showing inconsistent declarations out of court, when, according to the well settled rule, such questions are in general necessary, in order to give the witness an opportunity of explaining; but as Mrs. Taylor was the party, these declarations were evidence in themselves, and could be proved without giving such opportunity." *Sharswood, J., Brubacker v. Taylor*, 76 Penn. St. 86

² *Wheelden v. Wilson*, 41 Me. 1; *Quimby v. Morrill*, 47 Me. 470; *Lawton v. Chase*, 108 Mass. 241; *Snow v. Paine*, 114 Mass. 520. See *supra*, § 35; *infra*, §§ 508, 955; and *Thacher*

to this effect a series of rulings,¹ viewing this question in various lights. Thus a plaintiff, suing on a note, has been allowed to testify, in response to a defence of usury, as to intent in respect to such usury;² though it is said that such evidence is only admissible to explain ambiguous acts, not to control such as are unambiguous.³ An assignor, also, has been allowed to testify to his good faith in making an assignment.⁴ A plaintiff in an action of deceit has been permitted to testify as to his belief in the defendant's representations.⁵ When it is material as to whom a party voted for at an election, it is held admissible to ask him as to the way he intended to vote.⁶ In criminal cases, there can be no doubt that a defendant is competent to testify as to his intent, whenever his intent is material.⁷ In civil cases, however, it should be observed that the right of a party to testify as to his intent, in drawing a contract or other document, is limited in the same way as is other proof of intent;⁸ in other

v. Phinney, 7 Allen, 148, quoted *infra*, § 508.

¹ See Alb. Law J., Dec. 9, 1876, where these cases are elaborately reviewed. *S. P.*, *Persse v. Willett*, 1 Robt. N. Y. 13.

² *Thurston v. Cornell*, 38 N. Y. 281.

³ *Fiedler v. Darrin*, 50 N. Y. 437, followed in *Black v. Ryder*, 5 Daly, 304.

⁴ *Seymour v. Wilson*, 14 N. Y. 567, overruling *Hanford v. Arther*, 1 Hill, 347; followed by *Bedell v. Chase*, 34 N. Y. 386; and so, also, *Forbes v. Waller*, 25 N. Y. 430; *Mathews v. Poultney*, 33 Barb. 127.

"The court of appeals have overruled the exclusion of the testimony of the defendant, in a suit for malicious prosecution, that he believed the testimony of the plaintiff (prosecuted for perjury) was material, and that when he made the charge he believed the plaintiff was guilty. *McKown v. Hunter*, 30 N. Y. 625. See, also, *Tallman v. Kearney*, 3 Thompson & Cook, 412, and *Goodman v. Stroheim*, 4 Jones & Spencer, 216. But in a subsequent case in the fourth depart-

ment (*Lawyer v. Loomis*, 3 Thompson & Cook, 393), the exclusion of the reply of the defendant, a witness, to the question whether he had acted without malice, was held proper, on the ground that proof of lack of malice did not show probable cause, and was immaterial where want of probable cause was shown, as had been done in the case then at bar. *Fiedler v. Darrin* (above) is relied upon as authority for sustaining the exclusion of the evidence." Alb. Law J., *ut supra*.

On the other hand, in *Waugh v. Fielding*, 48 N. Y. 681, where the action was for a balance alleged to be due on a sale, and the defence was fraud, the plaintiff, as a witness at the trial, was asked, 'Did you give or intend to give the defendants anything more than your opinion in regard to' the condition of the chattel sold? The admission of the question was held error.

⁵ *Thorn v. Helmer*, 2 Keyes, 27.

⁶ *People v. Pease*, 27 N. Y. 45.

⁷ See *Wharton* on Hom. § 520.

⁸ See *infra*, § 955.

words, a party cannot be admitted to prove his intent so as to vary the terms of a document by which he is bound.¹ As to domicile, a party may in all cases be examined in reference to his intent, as the *animus manendi* is always material when domicile is to be determined.²

§ 483. If a party offers himself as a witness to disprove a criminal charge, can he excuse himself from answering on the ground that by so doing he would criminate himself? This question has been much agitated since the passing of the enabling statutes; and the general conclusion is, that so far as concerns questions touching the merits, the defendant, by making himself a witness as to an offence, waives his privileges to all matters connected with the offence.³ It has been ruled, also, that to affect his credibility, he may be asked whether he has been in prison on other charges,⁴ and whether he has suborned testimony in the particular case;⁵ though where there is no statute permitting such

He cannot avoid relevant questions on the ground that the answer would criminate.

¹ *Dillon v. Anderson*, 43 N. Y. 231; *Harrison v. Kirke*, 38 N. Y. Sup. Ct. (6 Jones & S. 396).

"It has also been held not to be competent for a contractor, a witness, to reply to the question, 'Who did you suppose you were making the contract with?' *Denman v. Campbell*, 7 Hun, 88; nor 'To whom did you look for performance of the contract?' *Kellar v. Richardson*, 5 Hun, 352; nor even 'For whom did you set up that machinery, as you supposed?' *Nichols v. The Kingdom Iron Ore Company*, 56 N. Y. 618. But in an action on a promissory note, the plaintiff was allowed to testify in response to the question, 'Were the supplies [proved to have been sold by him] furnished on the note or not?' *Lewis v. Rogers*, 34 N. Y. Super. Ct. (2 Jones & Spencer) 64." *Albany Law J.*, *ut supra*.

In *Tracy v. McManus*, 58 N. Y. 257, upon the issue whether the defendant testifying was a partner with other defendants, the plaintiffs had

introduced circumstantial evidence tending to show that he was, and had proved acts by him in furtherance of the partnership. His evidence thereupon, to the effect that the acts proved were done by him for the purpose merely of assisting the other defendants, who were his relatives, was held to have been improperly excluded.

² *Fisk v. Chester*, 8 Gray, 506. See *Whart. Conf. of L.* § 62.

³ *State v. Ober*, 52 N. H. 459; *Com. v. Lannan*, 13 Allen, 563; *Com. v. Mullen*, 97 Mass. 545; *Com. v. Curtis*, 97 Mass. 574; *Com. v. Morgan*, 107 Mass. 199; *Com. v. Nichols*, 114 Mass. 285; *Burdick v. People*, 58 Barb. 51; *Fralich v. People*, 65 Barb. 48; *McGarry v. People*, 2 Lansing, 227; *Brandon v. People*, 42 N. Y. 265; *Connors v. People*, 50 N. Y. 240; *Barber v. State*, 13 Fla. 675. See, however, *People v. McGungill*, 41 Cal. 429.

⁴ *Com. v. Bonner*, 97 Mass. 587.

⁵ *Martineau v. May*, 18 Wise. 54.

inquiries, and where the evidence does not go to motive or bias, answers as to collateral crimes should not be coerced.¹

Questions as to adultery, when this is at issue, are to be treated as are questions as to any other crime. But in divorce cases, as we have already seen, the evidence of parties is to be closely scanned,² and admissions of parties in such cases, or even the testimony of parties, as to adultery, are not, unless corroborated, usually sufficient to sustain a divorce.³

¹ *People v. Thomas*, 9 Mich. 321; *Gale v. People*, 26 Mich. 157. See, however, *State v. Ober*, 52 N. H. 459; *Clark v. Reese*, 35 Cal. 89. *French v. Venneman*, 14 Ind. 282. See *infra*, § 533.

In a remarkable case in England, in which Cardinal Wiseman was prosecuted for libel, the plaintiff, having failed in his attempts to prove the fact of publication, as a last resource proposed to examine the defendant himself. The cardinal, through his counsel, declined to be sworn, urging that, on the simple issue of "guilty or not guilty," no question could legally be put to him, the answer to which would not fall within the rule of protection, and it was alike useless and vexatious to swear a man, when no evidence pertinent to the issue could be extracted from him. On the other hand, it was urged with much force, that the objection had been taken too soon; that the plaintiff had a clear right to call his opponent as a witness, to cause an oath to be administered to him, and to ask him whatever questions he liked which were relevant to the issue; and that it was not until after the defendant had been sworn, and the questions had been put to him, that he was legally entitled to claim his protection. The learned judge erroneously ruled that the cardinal need not be sworn, but the only result of this ruling was, that the parties were put to the annoyance and expense of a new trial,

which in due course was granted by the exchequer. *Boyle v. Wiseman*, 10 Ex. R. 647. The new trial was granted on the 26th January, 1855, and £1000 damages were ultimately awarded. *Taylor's Evidence*, § 1270.

In another case involving the same principle, an action of trover brought against the London Dock Company for certain pipes of wine, the defendants alleged that the plaintiff had deposited with them "sour wine," the produce of "rummage sales," and that afterwards, by some means which were not miraculous but fraudulent, the wine had been converted into "sound port." The theory was, that sour wine had been recently abstracted, and empty pipes had been refilled by tapping the other stores in the dock. To assist the defendants in establishing this case, they applied to the court for leave to deliver interrogatories to the plaintiff under § 51 of Common Law Procedure Act, 1854 (*Osborn v. London Dock Co.* 10 Ex. R. 698; but see *Tupling v. Ward*, 6 H. & N. 749; 30 L. J. Ex. 222, S. C.); and the court, after the argument, granted the application, although it was strenuously argued on behalf of the plaintiff, that as the sole object of the questions was to fix him with a guilty participation in the fraud, he had clearly a right to refuse to answer them. *Taylor's Evidence*, § 1270.

² See *supra*, § 433.

³ *Infra*, § 1220. The exception in

§ 484. A party may be contradicted as to matters material to

the English statutes, in reference to adultery, are thus commented on by Mr. Taylor (Evidence, § 1221) :—

“When the evidence acts of 1851 and 1853 were respectively before parliament, it was not surprising that the legislature determined to exclude from their operation the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties. Obvious reasons would occur to any man why defendants in these suits should not be exposed to the almost irresistible temptation of committing perjury ; * and their exclusion from the witness box seemed at that time to afford the only safe mode of avoiding such a result. In the year 1857, however, when the law of divorce was amended, doubts were caused by the obscure language of the amending statute (see and compare 20 & 21 Vict. c. 85, §§ 41, 43, 46, and 48), as to how far the old doctrines of the common law, in relation to the competency of witnesses, were to be recognized in the new divorce court. These doubts gave rise to fresh legislation, which in its turn gave rise to fresh doubts and difficulties.

“At length Mr. George Denman carried through parliament a measure

(32 and 33 Vict. c. 68), which is supposed by many lawyers to have made the law what it ought to be. After repealing the fourth section of the Act of 1851, and so much of the second section of the Act of 1853, ‘as is contained in the words “or in any proceeding instituted in consequence of adultery,”’ it proceeds to enact, in § 3, as follows: ‘The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: provided, that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.’ The language used in this proviso, though not free from ambiguity, does not render inadmissible the evidence of a witness that he or she has committed adultery, but it simply protects the witness from being questioned on the subject, in the event of the protection being claimed. *Hebblethwaite v. Hebblethwaite*, 39 L. J. Pr. & Mat. 15; 2 Law Rep. P. &

* See on this subject the powerful observations of Lord Denman (then Mr. Denman), in Queen Caroline’s trial: “We have been told,” said he, “that Bergami might be produced as a witness in our exculpation, but we know this to be a fiction of lawyers, which common sense and natural feeling would reject. The very call is one of the unparalleled circumstances of this extraordinary case. From the beginning of the world no instance is to be found of a man accused of adultery being called as a witness to disprove. . . . How shameful an inquisition would the contrary practice engender! Great as is the obligation

to veracity, the circumstances might raise a doubt in the most conscientious mind whether it ought to prevail. Mere casuists might dispute with plausible arguments on either side, but the natural feelings of mankind would be likely to triumph over their moral doctrines. Supposing the existence of guilt, perjury itself would be thought venial in comparison with the exposure of a confiding woman. It follows that no such question ought in any case to be administered, nor such temptation given to tamper with the sanctity of oaths.” Quoted in 1 Ld. Brougham’s Speech, 248. And see *infra*, § 1220.

the issue;¹ but not as to matters collateral.² So, as we have seen, he may be contradicted by proof of prior inconsistent statements,³ and this without previously questioning him as to such statements.⁴ He is not protected, so far as concerns contradiction, by the rules applicable to witnesses in general. He may be contradicted by the party calling him; and he is open to a free examination from both sides.⁵ So, also, his character for truth and veracity may be impeached.⁶

§ 485. *A fortiori*, a party who has been examined in his own behalf, may be reexamined in rebuttal of the defendant's testimony,⁷ and may be called to contradict, under the usual limitations, testimony offered on his own side,⁸ or to explain ambiguities in his own testimony.⁹

§ 486. So far as concerns criminal issues, the discussion of this topic is remanded to another work.¹⁰ In civil issues, the question cannot arise in those states in which one party can compel the attendance of the other party as a witness. The refusal of the party, under any circumstances, to testify as to any facts with which he is familiar, must lead to the presumption which ordinarily holds against a party who withholds explanatory evidence in his power.¹¹

§ 487. If we are to be governed by equity analogies, it is not necessary, when a defendant is called as a witness, that his testimony denying the opposing case should be over-

D. 29, *S. C.*; *Babbage v. Babbage*, 2 44 Vt. 570; *Laramore v. Minish*, 43
Law Rep. P. & D. 222. No one but
Ga. 282.

the witness has any right to interfere. *Hebblethwaite v. Hebblethwaite*, 39
Infra, § 562.

L. J. Pr. & Mat. 15; 2 Law Rep. P. *Donohue v. People*, 56 N. Y. 208;
& D. 29, *S. C.* *Rust v. Shackleford*, 47 Ga. 538.

¹ *Fralich v. People*, 65 Barb. 48;
State v. Horne, 9 Kans. 119. *Infra*,
265. See *infra*, § 572.

§§ 480-1. ⁹ *Cousins v. Jackson*, 52 Ala. 262.

² *Marx v. People*, 63 Barb. 618.
See *infra*, § 559. ¹⁰ Whart. Cr. Law (7th ed.), §
782 c.

³ *Supra*, §§ 480, 481, 482; *infra*,
§ 551; *Brubaeker v. Taylor*, 76 Penn.
St. 83. ¹¹ *Perkins v. Hitchcock*, 49 Me.
468; *Whitney v. Bayley*, 4 Allen,
173; *Andrews v. Frye*, 104 Mass.
234. See, however, as qualifying
above, *Lowe v. Massey*, 62 Ill. 47;
and see *infra*, § 1266.

⁴ See *infra*, § 555; *Kreiter v. Bom-*
berger, 2 Weekly Notes of Cases, 685.

⁵ See *supra*, § 480; *Foster*, in re,

come by two witnesses. Such testimony may be overcome by one witness alone, with corroborative circumstances sustaining such witness.¹ Facts, indeed, when properly reproduced, may be always regarded as at least equivalent to any other form of proof; and peculiarly is this the case with deliberate writings of a party.² It should be remembered, however, that in courts of equity, where the defendant (replication having been filed) "positively, clearly, and precisely" denies by his answer any matter alleged in the bill, the denial must be countervailed by sufficient evidence of two witnesses, or of one witness and of circumstances, which is as good as two witnesses: otherwise the court will make no decree against the defendant.³

¹ See *supra*, § 414; *Holderness v. Rankin*, 2 De G., F. & F. 272; *Smith v. Constant*, 20 L. J. Ex. 55; *Jordan v. Money*, 5 H. of L. Cas. 185; *Smith v. Kay*, 7 H. of L. Cas. 750; *Gray v. Haig*, 20 Beav. 219; *Smith v. Constant*, 20 L. J. Ch. 128; *Sharry v. Garty*, 2 Ir. Eq. (N. S.) 358; *Bent v. Smith*, 22 N. J. Eq. 560; *Clark v. Van Riemsdyk*, 9 Cranch, 160; *Carpenter v. Ins. Co.* 4 How. 185; *Towne v. Smith*, 1 Woodb. & M. 118; *Zeigler v. Scott*, 10 Ga. 389; *Jones v. McLuskey*, 10 Ala. 27; *Latham v. Staples*, 46 Ala. 462; *Conrey v. Harrison*, 4 La. An. 349; *Fletcher v. Fletcher*, 5 La. An. 406; *Enders v. Williams*, 1 Mete. (Ky.) 346; *Proctor v. Terrill*, 8 B. Monr. 451.

² *Keys v. Williams*, 3 Y. & C. Ex. R. 55; *Savage v. Brocksopp*, 18 Ves. 335; 2 Story Eq. § 1528; *Pember v. Mathers*, 1 Br. Ch. R. 52; *Clark v. Van Riemsdyk*, 9 Cranch, 160.

³ *Per Kindersley, V. C., Williams v. Williams*, 12 W. R. 663; *East Ind. Co. v. Donald*, 9 Ves. 282; *Gresley's Ev.* 4; *Cooke v. Clayworth*, 18 Ves. 12; *Money v. Jorden*, 2 De Gex, M. & G. 336; *Smith v. Kay*, 7 H. of L. Cas. 750; *Anderson v. Collins*, 6 Ala. 783; *Hynson v. Texada*, 19 La. An. 470.

As to the application of this rule at common law, see *Ballentine v. White*, 77 Penn. St. 20.

That the rule does not operate in N. Y. practice, see *Stilwell v. Carpenter*, 62 N. Y. 639.

In Pennsylvania, in *Sower v. Weaver*, 78 Penn. St. 443, decided by the supreme court in May, 1875, it was held that in equitable cases the court would hold to the equity rule.

"A chancellor," said Sharswood, J., "must look at the whole evidence, and in this case the uncontradicted fact that, during Weaver's possession, Sower sold and conveyed a part of the land, with Weaver's knowledge and assent, for a school-house, would, of itself, contradict the inference of a parol gift. . . . But how stands the case since the Act of 1869, and supposing that the testimony of Weaver and his wife made out the gift? The defence was a purely equitable one. Had the defendant gone into a court of equity for a specific performance, or for an injunction to restrain the plaintiff from pursuing his legal title to turn him out of possession, the denial of the plaintiff, on oath, of the equity of the bill would have compelled the complainant in the bill to sustain it by two witnesses, or what

In divorce cases, a party's uncorroborated testimony will not be sufficient to sustain a judgment in a case where corroboration is practicable.¹

§ 488. A party's statements, when under examination on the witness stand, are not entitled to the force of judicial confessions, for they are not made *animo confitendi*, and they are sometimes uttered precipitately and inconsiderately, in confusion, or for the purpose of avoiding a temporary difficulty, rather than of making a solemn judicial

would be equivalent thereto. Here, George Sower, under oath, fairly and squarely denied all the equity which Weaver set up. Admitting Weaver and his wife to amount, together, to one sufficient witness, where is the remaining witness, or that which is equivalent thereto? It is not to be found in the case. It is clear that this well established rule of equity must be applied in cases of this character, or the rule must be abolished on the equity side of the court. As long as equitable ejectments may be maintained, and equitable defences set up at law, to legal titles, we must see to it that the same rule and measure of justice be applied, whether the proceeding be at law or in equity. We adopted and announced this principle in the opinion in the Dollar Savings Bank v. Bennett, decided at Pittsburgh, Nov. 1874, and it is our purpose to adhere to it."

In Jan. 1876, however (Prowattain v. Tindall, 2 Weekly Notes, 265), it was ruled that, since the Act of 1869, permitting parties to testify, the testimony of a defendant on his own behalf in an action of covenant is sufficient, although uncorroborated, to maintain an equitable defence,—its credibility only being a question for the jury as in other cases. In this case the proof was that A. sold to B. a lot of ground, which was subject to a ground-rent, the deed containing a

covenant that A. would pay it off. In an action by B. against A. for breach of this covenant, the defence was set up that, before delivery of the deed, B. promised, verbally, to pay off the ground-rent himself, whereby the defendant (A.) was induced to deliver the deed. There being no evidence of the alleged parol agreement, other than the defendant's own statement, the court below instructed the jury that the evidence of the defendant was to be disregarded, because not corroborated. It was held in the supreme court that such instruction was erroneous, in that it deprived the defendant of the benefit of his own testimony, to which he was entitled under the Act of 15th April, 1869.

"This instruction," said Gordon, J., "was erroneous. It annulled the Act of 1869, in that it deprived the defendant of the benefit of his own testimony. That act does not require that the evidence of the party in interest, though the only evidence on his side of the case trying, should be corroborated in order to make it effective. Such testimony, just as any other, must be submitted to the jury, and it is for that body to say how far the interest of the witness giving it shall affect its credibility. The jury may discard it as unworthy of belief, but the court may not do so."

¹ Supra, § 433; infra, § 1220.

statement. They do not, therefore, estop, as may sometimes a judicial admission; but they are nevertheless entitled to high consideration, and cannot, without proof of surprise, be contradicted by the party making them in the same cause. "Obviously," says a learned judge in Michigan, speaking of a case of this class, "the case is to be regarded in a light somewhat different from what it should have been, had the evidence which the plaintiff gave, been given by other witnesses. In the latter case the evidence of facts, precluding recovery, would be addressed to a jury who might not give them full credence, or who might suppose them qualified by other evidence considerably modifying their legal effect. But the plaintiff who states his own case on the witness stand, and states himself out of court, cannot well ask the jury to disbelieve or disregard that which tells against him. If he unequivocally states facts which establish a defence, and there is no attempt at a qualifying explanation by other witnesses, he has no ground of complaint if the court charges the jury that no recovery is justifiable."¹

§ 489. The effect of the statutes is not simply to enable the parties to testify in their own behalf as witnesses. The removal of their incapacity is total; and not only may they be called as witnesses in their own behalf, but they may be compelled to answer as witnesses for their opponents.² The parties thus called are examined under the same limitations, have the same protection, and are open to the same contradiction and impeachment, as are ordinary witnesses.³ By calling a party as a witness, all objections to his competency are waived.⁴ He may be cross-examined by his own counsel.⁵

Under statutes one party may call the other as witness.

¹ Cooley, J., *Davis v. Detroit R. R. Co.* 20 Mich. 128. Supra, § 461.

² *Texas v. Chiles*, 21 Wall. 488; *Olive v. Adams*, 50 Ala. 373.

³ *French v. Venneman*, 14 Ind. 282; *Dwinelle v. Henriquez*, 1 Cal. 387; *Drake v. Eakin*, 10 Cal. 312; *Shepherd v. Payson*, 16 La. An. 360. That leading questions to such a witness can be put, see *infra*, § 499.

⁴ *Turner v. McIlhane*, 8 Cal. 575.

⁵ *Teel v. Byrne*, 24 N. J. L. 631.

"Upon this point Hatcher was him-

self competent to testify, and our statute (*Wagn. Stat.* 1373, § 3) declares that 'any party to any civil action or proceeding may compel any adverse party, or any person for whose immediate and adverse benefit such action or proceeding is instituted, prosecuted, or defended, to testify as a witness in his behalf, in the same manner, and subject to the same rules, as other witnesses, provided that the party so called to testify may be examined by the opposite party, under the rules ap-

§ 490. Under the statutes authorizing one party to examine another, before trial, on interrogatories, the answers of a party, so taken, are not evidence, unless made so by the party by whom the interrogatories are put.¹ In taking and using such evidence, the equity practice, as applied to bills of discovery, will be adopted, so far as is practicable.² The court, on a failure to answer, may compel an answer by attachment, or continue the case until full answers are made.³ An evasive and frivolous answer may be treated as a confession.⁴

Where party is examined on interrogatories, equity practice is followed. plicable to the cross-examination of witnesses.' The seventh section declares that 'if any party, on being duly summoned, refuse to attend and testify, either in court or before any person authorized to take his deposition, besides being punished himself as for a contempt, his petition, answer, or reply may be rejected, or a motion, if made by himself, overruled, or if made by the adverse party, sustained.'

"These provisions of our statute, which have been there since the revision of 1835, were probably designed as a substitute for the ancient chancery practice in regard to interrogatories appended to a bill, and had the same object in view, which was to give a party an opportunity to sift the conscience of his adversary. If the interrogatories were unheeded, the court of chancery regarded the party refusing to answer as in contempt; and our statute, on the failure of the parties summoned to appear and submit to examination as a witness, authorizes the court to reject his petition or answer or reply. It will be observed that the answer of Hatcher is not sworn to, nor was it necessary under our practice that it should have been." *Eck v. Hatcher*, 58 Mo. 239, Napton, J.

¹ *Wells v. Bransford*, 28 Ala. 200.

² *Wilson v. Webber*, 2 Gray, 558;

Richards v. Judd, 15 Abb. (N. Y.) Pr. N. S. 184; *Barnard v. Flinn*, 8 Ind. 204; *Draggoo v. Draggoo*, 10 Ind. 95; *Everly v. Cole*, 3 G. Greene, 239; *Jones v. Berryhill*, 25 Iowa, 289; *Blossom v. Ludington*, 32 Wisc. 212; *Zeigler v. Scott*, 10 Ga. 389; *Thornton v. Adkins*, 19 Ga. 464; *Roberts v. Keaton*, 21 Ga. 180; *Dyson v. Beckam*, 35 Ga. 132; *Pritchett v. Munroe*, 22 Ala. 501; *Weaver v. Alabama Co.* 35 Ala. 176; *Burnett v. Garnett*, 18 B. Mon. 68; *Haynes v. Heard*, 3 La. An. 648; *Taylor v. Paterson*, 9 La. An. 251; *Nicholson v. Sherard*, 10 La. An. 533; *McMillan v. Croft*, 2 Tex. 397; *Beal v. Alexander*, 6 Tex. 531; *Gill v. Campbell*, 24 Tex. 405. See *Winston v. English*, 35 N. Y. Sup. Ct. 512; *Drennen v. Lindsey*, 15 Ark. 359; *Adkins v. Hershy*, 17 Ark. 425.

³ *McLendon*, ex parte, 33 Ala. 276.

⁴ *Whiting v. Ivey*, 3 La. An. 649; *Prater v. Pritchard*, 6 La. An. 730; *Knox v. Thompson*, 12 La. An. 114; *Walker v. Wingfield*, 16 La. An. 300; *Meyer v. Claus*, 15 Tex. 516. See *Amherst R. R. v. Watson*, 8 Gray, 529.

The English Common Law Procedure Act of 1854 (17 & 18 Vict. c. 125) enacts, in § 51, that "In all causes in any of the superior courts, by order of the court or a judge, the plaintiff

VIII. EXAMINATION OF WITNESSES.

§ 491. Whenever sufficient ground is laid for the application, the judge may at his discretion order such a separation of witnesses as may prevent those not yet examined from hearing the testimony of the witness on the

Judge may order separation of witnesses.

may, with the declaration, and the defendant may, with the plea, or either of them by leave of the court or a judge may, at any other time, deliver to the opposite party or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter) *interrogatories in writing upon any matter as to which discovery may be sought*, and require such party, or in the case of a body corporate, any of the officers (*Madrid Bk. v. Bayley*, 36 L. J. Q. B. 15; 2 Law Rep. Q. B. 37; 8 B. & S. 29, S. C.) of such body corporate, *within ten days* to answer the questions in writing by affidavit, to be sworn and filed in the ordinary way; and any party or officer omitting, without just cause, sufficiently to answer all questions as to which a discovery may be sought within the above time, or such extended time as the court or a judge shall allow, shall be deemed to have committed a contempt of the court, and shall be liable to be proceeded against accordingly."

Mr. Taylor (Ev. §§ 482, ff.) thus recapitulates the rulings under the above statute, rulings which may be of value in this country under similar statutes: "When these provisions first came into operation, a very eminent judge appears to have suggested that any question might be asked on interrogatories which could be put were the party a witness at the trial; *Osborn v. London Dock Co.* 10 Ex. R. 698, 702, per Alderson, B.; see *Zychlinski v. Maltby*, 10 Com. B. N.

S. 838; but this interpretation of the statute has since been considered too wide, and it is now properly held that courts of law should be guided, though not fettered, by the rules and principles which courts of equity act upon with respect to bills of discovery; *Pye v. Butterfield*, 34 L. J. Q. B. 17; 5 B. & S. 829, S. C.; and that the interrogatories should be confined to matters which might be discovered by a bill in equity. *Whately v. Crowter*, 5 E. & B. 712, per Ld. Campbell. In an action of ejectment, therefore, a defendant will not be compelled to answer interrogatories, where the answer would tend to show that he had incurred a forfeiture of his lease by reason of his having underlet the premises. *Pye v. Butterfield*, 34 L. J. Q. B. 17; 5 B. & S. 829, S. C. Neither can a party inquire into facts which relate *exclusively* to the case of his adversary, although he may ask any questions the answers to which will advance his own case, even though they may also disclose his opponent's case. *Bayley v. Griffiths*, 31 L. J. Ex. 477; 1 H. & C. 429, S. C.; *Goodman v. Holroyd*, 15 Com. B. N. S. 839; *Hawkins v. Carr*, and *Parsons v. Carr*, 35 L. J. Q. B. 81; 1 Law Rep. Q. B. 89, S. C.; 6 B. & S. 995, S. C.; *Stewart v. Smith*, 2 Law Rep. C. P. 293. For instance, in an action on a policy of insurance on a cargo, claiming for a total loss, if the pleas be only such as deny the policy, the interest, and the loading, the plaintiff cannot be interrogated as to the sev-

stand.¹ Whoever is yet to be examined, though party or prose-

eral matters which these pleas will require him to prove; but if there be also a plea denying the loss, interrogatories may be tendered with respect to the amount of damage; and if the defendant were further to plead that the sailing of the vessel had been unreasonably delayed, the plaintiff might be questioned with respect to this fact. *Zarifi v. Thornton*, 26 L. J. Ex. 214. On the same ground, if an action for negligence be brought against a surveyor or an attorney, the defendant may be asked what steps he took to perform his duty. *Whateley v. Crowter*, 5 E. & B. 709. So, where a plaintiff had brought an action for money had and received, and his right to recover rested on the assumption that the defendant had, in selling certain property to him, falsely professed to act as broker for a third party, the court allowed interrogatories to be delivered to the defendant, requiring him to answer whether he had acted in the transaction as principal or as agent, and, if as agent, to name his principal. *Thöl v. Leask*, 10 Ex. R. 704. See, also *Blight v. Goodliffe*, 18 Com. B. N. S. 757.

"Where a party, on being interrogated as to whether he had in his possession any deeds relating to the lands in dispute, answered on oath that he had, but that such deeds were exclusively the evidences of his own title to the property, and did not show any title in his opponent, the court held that he could not be compelled to state the contents of the documents, or to describe them, but that his oath

as to their effect must be deemed conclusive. *Adams v. Lloyd*, 3 H. & N. 351. If *prima facie* evidence of the loss of a deed be made out by affidavit, the party supposed to have executed the instrument may be interrogated *de bene esse* as to its contents. *Wolverhampton New Waterw. Co. v. Hawksford*, 5 Com. B. N. S. 703. Again, a plaintiff in ejectment may interrogate the defendant as to whether he is not really defending the action on behalf of a third person; for an affirmative answer to such a question would go far towards making the declarations of such third person admissible in evidence. *Sketchley v. Conolly*, 2 New R. 23, per Q. B.

"It appears now to be determined (*Fliteroft v. Fletcher*, 11 Ex. R. 543; *Kettlewell v. Dyson*, 9 B. & S. 300), notwithstanding some decisions which 'look the other way;' see *Edwards v. Wakefield*, 6 E. & B. 469; *Stoate v. Rew*, 32 L. J. C. P. 160; 14 Com. B. N. S. 209, *S. C.*; see, also, *Wallen v. Forrest*, L. R. 7 Q. B. 239; that a defendant in ejectment is entitled to interrogate the plaintiff, not only as to the character in which he sues, but as to the nature of the pedigree on which he relies; but the affidavit in support of such an application should, as it seems, disclose special circumstances; *Pearson v. Turner*, 16 Com. B. N. S. 157; 33 L. J. C. P. 224, *S. C.*; and the ruling can only be upheld on the ground that the court has a general power to require any person, who seeks to disturb the possession of another, to say by what right he does

¹ *Southey v. Nash*, 7 C. & P. 632; *Selfe v. Isaacson*, 1 F. & F. 194; *People v. Green*, 1 Parker C. R. 11; *State v. Zellers*, 2 Halst. 220; *Errissman v. Errissman*, 25 Ill. 136; *Johnson v.*

State, 2 Ind. 652; *Benaway v. Conyne*, 3 Chandl. 214; *Nelson v. State*, 2 Swan, 237; *McLean v. State*, 16 Ala. 672.

cutor, is subject to this rule.¹ A witness's testimony, it is true,

so; per Alderson, B., in *Fliteroft v. Fletcher*, 11 Ex. R. 549; *Bellwood v. Wetherell*, 1 Y. & C. Ex. R. 211, 218, per Ld. Abinger; *Stoate v. Rew*, 32 L. J. C. P. 160; 14 Com. B. N. S. 209, S. C. A plaintiff, therefore, in ejectment, who claims as heir at law, will not be permitted to interrogate the person in possession of the property as to the nature of his title. *Horton v. Bott*, 2 H. & N. 249. Neither, as a general rule, will any party be suffered to expose his adversary to fishing interrogatories, or to require him to declare on oath how he intends to shape his case. *Edwards v. Wakefield*, 6 E. & B. 462; *Moor v. Roberts*, 26 L. J. C. P. 246; 2 Com. B. N. S. 671, S. C. For example, in an action of trover by the trustee of a bankrupt, the defendant will not be permitted to administer interrogatories to the plaintiff for the purpose of discovering what case he intends to set up at the trial. *Edwards v. Wakefield*, 6 E. & B. 462. See, also, *Finney v. Forward*, 35 L. J. Ex. 42; 1 Law Rep. Ex. 6; and 4 H. & C. 33, S. C. But see *Derby Bank v. Lumsden*, 5 Law Rep. C. P. 107; 39 L. J. C. P. 72, S. C. The plaintiff, too, in an action of slander, will not (except under very special circumstances precluding redress by other means; *Atkinson v. Fosbrooke*, 35 L. J. Q. B. 182; 1 Law Rep. Q. B. 628; 7 B. & S. 618, S. C.; see *O'Connell v. Barry*, 2 I. R. C. L. 648. *Sed qu.*) be allowed to interrogate the defendant with respect to the precise words he uttered, and when, where, and to whom he spoke them. *Stern v. Sevas-topulo*, 2 New R. 329; 32 L. J. C. P. 268; 14 Com. B. N. S. 737, S. C.; *Tupling v. Ward*, 30 L. J. Ex. 222; 6 H. & N. 749, S. C.; *Edmunds v.*

Greenwood, 4 Law Rep. C. P. 70; 38 L. J. C. P. 115, S. C. Neither can the defendant, in an action for negligence, interrogate the plaintiff as to how the accident happened, or what was the extent of the injury, or what was the amount of the medical charges. *Peppiatt v. Smith*, 3 H. & C. 129; 33 L. J. Ex. 239, S. C. But see *Wright v. Goodlake*, 34 L. J. Ex. 82; 3 H. & C. 540, S. C. Still less will a judge, except under very special circumstances, permit a defendant, who admits a breach of contract, to interrogate the plaintiff respecting the damage he has sustained, with the view of paying money into court. *Jourdain v. Palmer*, 35 L. J. Ex. 69; 4 H. & C. 171; and 1 Law Rep. Ex. 102, S. C., commenting on *Wright v. Goodlake*, 34 L. J. Ex. 82; 3 H. & C. 540, S. C. See *Dobson v. Richardson*, 37 L. J. Q. B. 261; 3 Law Rep. Q. B. 778; and 9 B. & S. 516, S. C. Nor, as it seems, will interrogatories be allowed, when the interrogator has ample means of obtaining from his own agents the information which he professes to seek from his opponent. *Bird v. Malzy*, 1 Com. B. N. S. 308. But see *Rew v. Hutchins*, 10 Com. B. N. S. 837, per Erle, C. J.; or when the object is to contradict a written instrument; *Moor v. Roberts*, 26 L. J. C. P. 246; 2 Com. B. N. S. 671, S. C.; or to gain some tricky advantage not dependent on real information, or to heap up needless costs. *Bechervaise v. Gt. West. Ry. Co.* 6 Law Rep. C. P. 36; 4 L. J. C. P. 8, S. C.

“The judges have also, on the subject of interrogatories, laid down the following practical rules: first, that on a motion to allow the exhibition of interrogatories, the court will

¹ *R. v. Newman*, 3 C. & K. 260.

will not be necessarily ruled out because he remains in court,

simply determine the principle on which they are to be allowed or refused, and will leave their form, in case of dispute, to be settled at chambers. *Zarifi v. Thornton*, 26 L. J. Ex. 214. See *Robson v. Crawley*, 2 H. & N. 766; *S. C.*, *nom.* *Robson v. Cooke*, 27 L. J. Ex. 153, per Pollock, C. B.; *Rew v. Hutchins*, 10 Com. B. N. S. 829, 837. See, also, *Phillips v. Lewin*, 34 L. J. Ex. 37; secondly, that, as the legislature has fixed the time of proceeding, the court, except under special circumstances, amounting almost to a case of urgent necessity (see *Acheson v. Henry*, 5 I. R. C. L. 496), will not permit the delivery of interrogatories by a plaintiff *before* he has declared, or by a defendant *before* he has pleaded; *Martin v. Hemming*, 10 Ex. R. 478; explained in *Forshaw v. Lewis*, *Ibid.* 716; *Croomes v. Morrison*, 5 E. & B. 984; *Jones v. Pratt*, 6 H. & N. 697; *Anon. v. Parr*, 34 L. J. Q. B. 95; *S. C.*, *nom.* *Morris v. Parr*, 6 B. & S. 203; thirdly, that a plaintiff may without a special affidavit obtain leave to deliver interrogatories *after* the defendant has pleaded; *James v. Barns*, 17 Com. B. 596; fourthly, that where a party interrogated admits his possession of documents, he cannot be attached for refusing to set forth their contents, but his opponent must apply for an order to inspect them, either under § 50 of the act, or under § 6 of 14 & 15 Viet. c. 99; *Scott v. Zygomala*, 4 E. & B. 483; *Herschfeld v. Clarke*, 11 Ex. R. 712; fifthly, that a plaintiff may be ordered to answer interrogatories, though he be a foreigner resident abroad; *Pöhl v. Young*, 25 L. J. Q. B. 23; sixthly, that an application for leave to deliver interrogatories, provided it be made *bonâ fide*; *Baker v. Lane*, 34 L. J. Ex. 57; 3 H. & C. 544, *S. C.*, as explained away in *Bickford*

v. D'Arcy, 35 L. J. Ex. 202; 4 H. & C. 540, *S. C.*; and be supported by an affidavit disclosing special circumstances; *Villeboisnet v. Tobin*, 38 L. J. C. P. 146; 4 Law Rep. C. P. 184, *S. C.*; *Inman v. Jenkins*, 39 L. J. C. P. 258; 5 Law Rep. C. P. 738, *S. C.*; cannot be resisted on an affidavit that the questions, if answered, may tend to criminate the party interrogated; *Osborn v. London Dock Co.* 10 Ex. R. 698, *M'Fadzen v. May & Corp. of Liverpool*, 3 Law Rep. Ex. 279; 37 L. J. Ex. 193, *S. C.*; *Bartlett v. Lewis*, 31 L. J. C. P. 230; 12 Com. B. N. S. 249, *S. C.*; *Goodman v. Holroyd*, 15 Com. B. N. S. 839; *Simpson v. Carter*, 30 L. J. Ex. 224, in n. 7; or may expose him to a forfeiture of his estate; *Chester v. Wortley*, 17 Com. B. 410; *Bickford v. D'Arcy*, 35 L. J. Ex. 202; 1 Law Rep. Ex. 354; and 4 H. & C. 534, *S. C.*; See *Pye v. Butterfield*, 34 L. J. Q. B. 17; seventhly, that the enactment under discussion applies to actions of ejectment; *Fliteroft v. Fletcher*, 11 Ex. R. 543; *Pearson v. Turner*, 16 Com. B. N. S. 157; 33 L. J. C. P. 224, *S. C.*; *Horton v. Bott*, 2 H. & N. 249; *Stoate v. Rew*, 32 L. J. C. P. 160; 14 Com. B. N. S. 109, *S. C.*; *Chester v. Wortley*, 17 Com. B. 418; but see *Blyth v. L'Estrange*, 3 Fost. & Fin. 154, per Blackburn, J.; and interpleader issues; *White v. Watts*, 12 Com. B. N. S. 267; as well as to ordinary actions; and, eighthly, that it extends equally to real and to nominal parties; *M'Kewan v. Rolt*, 4 H. & N. 738; *Mason v. Wythe*, 3 Fost. & Fin. 153, per Keating, J."

As several of our American statutes are modelled after the English statute, the above rulings may be of value to ourselves.

even wilfully, after being ordered to withdraw;¹ but he exposes himself, by his disobedience, to an attachment for contempt.² But where the party calling the witness is to blame for the disobedience, then the witness may be excluded.³ To prevent a witness from being unduly influenced by the knowledge of the line to which his testimony is expected to reach, it has even been held that the court will order his withdrawal during a legal argument in respect to his evidence.⁴ But this goes too far, since it would require witnesses to leave the court whenever the counsel calling them states, as he constantly is compelled to do, what he intends to prove by questions he may put. Yet in all cases where there is reason to believe that a willing witness is waiting to catch his instructions from counsel, the witness should be excluded. The rule, however, will be made to bend as far as possible to the convenience of the witness. Thus experts may be permitted to remain in court until the expert testimony begins;⁵ and to attorneys it is especially conceded that they may be excused, when personally required in court, from such withdrawal.⁶

§ 492. When a witness's competency is in dispute, he may be

¹ *Chandler v. Horne*, 2 M. & R. 423; *Cobbett v. Hudson*, 1 E. & B. 14; *Hopper v. Com.* 6 Grat. 684; *Langlin v. State*, 18 Ohio, 99; *Porter v. State*, 2 Ind. 435; *Grimes v. Martin*, 10 Iowa, 347; *State v. Fitzsimmons*, 30 Mo. 236; *Keith v. Wilson*, 6 Mo. 434; *State v. Salge*, 2 Nev. 321; *Davenport v. Ogg*, 15 Kans. 363; *Pleasant v. State*, 15 Ark. 624; *Bell v. State*, 44 Ala. 393; *Sartorius v. State*, 24 Miss. 602; *People v. Boscowitch*, 20 Cal. 436. The proper view (*Wilson v. State*, 52 Ala. 299) is, that the examination of the witness in such case is discretionary with the court. In 2 *Phill. on Evid.* (5th Am. ed.) 744, it is said: "If a witness, who has been ordered to withdraw, continues in court, it was formerly considered to be in the judge's discretion whether or not the witness should be examined. But it may now be consid-

ered as settled, that the circumstance of a witness having remained in court, in disobedience to an order of withdrawal, is not a ground for rejecting his evidence, and that it merely affords matter of observation." The old rule was always to exclude the testimony. *Parker v. McWilliam*, 6 Bing. 683; *Thomas v. David*, 7 C. & P. 350; *Jackson v. State*, 14 Ind. 327.

² *Chandler v. Horne*, 2 M. & Rob. 423; *Bell v. State*, 44 Ala. 393.

³ *Dyer v. Morris*, 4 Mo. 214.

⁴ *R. v. Murphy*, 8 C. & P. 307; *Charnock v. Devings*, 3 C. & K. 378; *Selle v. Isaacs*, 1 F. & F. 494; *Nelson v. State*, 2 Swan, 237.

⁵ *Alison*, *Pract. Cr. L.* 489; *Taylor's Ev.* § 1260.

⁶ *Everett v. Lowdham*, 4 C. & P. 91; *Pomeroy v. Baddely*, R. & M. 430.

examined, according to the old practice, on his *voir dire*, in other words, he is sworn, with the usual solemnities, to make true answers to all questions to be put to him by the court.¹ The use of such a test is now questioned,² for if the witness can be sworn on the *voir dire*, he can be sworn on the examination in chief; if he is incompetent on the examination in chief, he is incompetent on the *voir dire*.³ Hence it is now the English practice to put questions as to competency to the witness on his examination in chief. When so examined, he may speak, so it is ruled, as to the contents of written instruments without their being brought into court.⁴ In the United States, however, the practice of examining as to competency on the *voir dire* continues in many courts,⁵ though this is at the discretion of the judge, who may remand the question of competency to the examination in chief.⁶ The appeal to the *voir dire* does not preclude recourse to other means of proving incompetency.⁷

§ 493. It is elsewhere noticed that the interpretation, by a sworn interpreter, of the testimony of a foreign witness, is not hearsay.⁸ It may be added that the accuracy of the interpretation of the sworn interpreter may be impeached, and is ultimately to be determined by the jury.⁹ A witness, without being specially sworn, may interpret

Interpreters to be sworn.

¹ Mifflin v. Bingham, 1 Dall. 276.

² See Taylor's Evidence, § 1257.

³ See, also, Jacobs v. Layborn, 11 M. & W. 685.

⁴ Taylor's Ev. § 1257, citing R. v. Gisburn, 15 East, 57; Lunnis v. Row, 10 A. & E. 606; Quarterman v. Cox, 8 C. & P. 97; Brockbank v. Anderson, 7 M. & Gr. 295-313; S. P. Herndon v. Givens, 16 Ala. 261.

⁵ Fifield v. Smith, 21 Me. 383; Walker v. Sawyer, 13 N. H. 191; Smith v. Fairbanks, 27 N. H. 521; Bridge v. Wellington, 1 Mass. 219; Stebbins v. Sackett, 5 Conn. 258; Seeley v. Engell, 13 N. Y. 542; Foley v. Mason, 6 Md. 37; Wright v. Matthews, 2 Blackf. 187; Waughop v. Weeks, 22 Ill. 350; Diversy v. Will,

28 Ill. 216; Walker v. Collier, 37 Ill. 362; Harrel v. State, 1 Head, 125; Bailey v. Barnelly, 23 Ga. 582; Tarleton v. Johnson, 25 Ala. 300; Weigel's Succession, 18 La. An. 49; Hooker v. Johnson, 6 Fla. 730.

⁶ Seeley v. Engell, 17 Barb. 530.

⁷ Stebbins v. Sackett, 5 Conn. 258; Blackstock v. Leidy, 19 Penn. St. 335. See, however, Le Barron v. Redman, 30 Me. 536; Schnader v. Schnader, 26 Penn. St. 384; Williams v. Man. Co. 1 Md. Ch. 306.

⁸ Supra, § 174.

⁹ U. S. v. Gibert, 2 Sumn. 19; Schnier v. People, 23 Ill. 17. As to New York practice, see Leetch v. Ins. Co. 2 Daly, 518.

foreign terms used by himself.¹ When a witness can only speak in a whisper, the court may appoint a suitable person to repeat to the jury what is said by the witness.²

§ 494. A witness who refuses to answer a question determined by the court to be proper, is in contempt, and may be attached and committed to custody to be detained until he replies.³ The same practice exists where the witness refuses to be sworn, or misbehaves when giving evidence.⁴

Witness refusing to answer punishable by attachment.

§ 495. A witness is not entitled to set up, in reply to a rule to show cause why an attachment should not issue against him, that his testimony was immaterial, and that therefore he did not answer.⁵ But if it appear on hearing of the rule, that his testimony would be irrelevant, especially if he be a public officer whose attendance would be detrimental to other branches of the public service, then the court will refuse the attachment.⁶ But while public duties may be held to relieve a party from attendance, no private engagements, no matter how solemn, are allowed to have the same effect.⁷ When attending, it is not for the witness to say that the questions asked him relate to his private affairs, and are irrelevant. The question of relevancy is for the court.⁸

Witness is no judge of materiality of his testimony.

§ 496. It is within the power of the court, at any period of the examination, to put questions to the witness for the purpose of eliciting facts bearing on the issue; and the witness may be even recalled for this purpose. Nor is the court, as to evidence, bound by the rule excluding leading questions.⁹ But an answer not in itself evidence, brought out by a question from the court, may be ground for reversal.¹⁰

Court may examine witness.

¹ Kuhlman v. Medlinka, 29 Tex. 385.

Chapman v. Davis, 3 M. & G. 609; S. C. 4 Scott N. R. 319.

² Conner v. State, 25 Ga. 515.

⁶ Dieas v. Lawson, 1 C., M. & R.

³ Whart. Cr. L. § 3432; Broom & Hadley's Com. iv. 364 (Am. ed. ii. 567); R. v. Charlesworth, 2 F. & F. 332; U. S. v. Coolidge, 2 Gall. 364; U. S. v. Caton, 1 Cranch C. C. 159; People v. Kelly, 24 N. Y. 74; Holman v. Austin, 34 Tex. 668.

934; 7 Dowl. 693. See supra, § 383.

⁷ Jackson v. Seager, 2 Dowl. & L. 13; Goff v. Mills, 2 Dowl. & L. 23.

⁸ Tippins v. Coates, 6 Hare, 16.

⁴ May, Law of Parl. 405; 4 Bl. Com. 284.

⁹ Supra, § 281; R. v. Watson, 6 C. & P. 653; Middleton v. Bamed, 4 Exch. R. 243; Com. v. Galavan, 9 Allen, 271; Palmer v. White, 10 Cush. 321; Epps v. State, 19 Ga. 102.

¹⁰ People v. Lacoste, 37 N. Y. 192.

⁵ Scholes v. Hilton, 10 M. & W. 16;

§ 497. A witness, examined as such in a court of justice, is so far privileged that he is not liable to suit for words spoken by him in answer to questions put by counsel, with the allowance, either express or implied, of the court.¹ And in England this protection was extended in 1876 to volunteer explanations, which, out of court, would have been libellous.²

§ 498. That a party cannot lead his witness by questions which in themselves indicate the answer the witness is desired to make, is a check which in some junctures is of much value. Against the rule it has been sometimes said that an unwilling witness requires leading questions, and that a willing witness can do without them. The first objection we will consider presently. As to the second objection, it must be observed that there are contingencies in a case for which no witness, however willing, can have a solution prearranged for his use. Skilful counsel may indeed see on the moment such solutions, and if counsel were allowed to put the solution in the mouth of an unprincipled witness, there would be many cases in which truth would be thereby suppressed and justice frustrated.

§ 499. Hence it is that the courts have united in maintaining that a party is not permitted, as a rule, to put to his witness questions which involve or assume the answer which the party desires the witness to make, or which suggest disputed facts as to which the witness is to testify.³ The rule, Mr. Best tells us,⁴ is based on two reasons. First, and principally, on the supposition that the witness has a bias in favor of the party bringing him forward, and hostile to his opponent. Secondly, that the party calling a witness has an advan-

¹ *Revis v. Smith*, 18 C. B. 126; *Henderson v. Broomhead*, 4 H. & N. 569; *Kennedy v. Hilliard*, 10 Ir. L. R. N. S. 195.

² *Seaman v. Netherclift*, L. R. 1 C. P. D. 540; cited *infra*, § 722.

³ *Stephen's Ev.* 123; *Nicholls v. Dowding*, 1 Stark. R. 81; *Page v. Parker*, 40 N. H. 47; *Wells v. Man. Co.* 48 N. H. 491; *People v. Mather*, 4

Wend. 229; *Snyder v. Snyder*, 6 Binn. 483; *Lee v. Tinges*, 7 Md. 215; *Hopper v. Com.* 6 Grat. 684; *Carpenter v. Ambrosion*, 20 Ill. 170; *Osborn v. Forshree*, 22 Mich. 209; *Stringfellow v. State*, 26 Miss. 157; *McLean v. Thorp*, 3 Mo. 315; *Mathers v. Buford*, 17 Tex. 152.

⁴ *Ev.* § 641.

tage over his adversary, in knowing beforehand what the witness will prove, or at least is expected to prove; and that, consequently, if he were allowed to lead, he might interrogate in such a manner as to extract only so much of the knowledge of the witness as would be favorable to his side, or even put a false gloss upon the whole.¹

§ 500. Yet to this rule there are several marked exceptions, where an unwilling witness, or a witness called from the necessity of the case, may have put to him questions requiring an answer of yes or no to a specific detailed proposition.² This is the case with attesting witnesses called by order of court;³ with unwilling witnesses who have made prior contradictory statements,⁴ and eminently so with parties,

Exception
as to un-
willing
witness.

¹ It is sometimes said, "That the test of a leading question is whether an answer to it by 'yes' or 'no' would be conclusive upon the matter in issue; but although all such questions undoubtedly come within the rule, it is by no means limited to them. Where 'yes' or 'no' would be conclusive on any part of the issue, the question would be equally objectionable; as if, on traverse of notice of dishonor of a bill of exchange, a witness were led either as to the fact of giving the notice, or as to the time when it was given. So, leading questions ought not to be put when it is sought to prove material and proximate circumstances. Thus, on an indictment for murder by stabbing, the asking a witness if he saw the accused covered with blood and with a knife in his hand coming away from the corpse, would be in the highest degree improper, though all the facts embodied in this question are consistent with his innocence. In practice, leading questions are often allowed to pass without objection, sometimes by express, and sometimes by tacit consent. This latter occurs where the questions relate to matters which, though strictly speaking in issue, the examining counsel is aware are not meant to be

contested by the other side; or where the opposing counsel does not think it worth his while to object.

"On the other hand, however, very unfounded objections are constantly taken on this ground. A question is objectionable as leading when it suggests the answer, not when it merely directs the attention of the witness to the subject respecting which he is questioned." *Ibid.*

² *Parkin v. Moon*, 7 C. & P. 409; *R. v. Chapman*, 8 C. & P. 559; *State v. Lull*, 37 Me. 246; *State v. Benner*, 64 Me. 267; *Severance v. Carr*, 43 N. H. 65; *Moody v. Rowell*, 17 Pick. 490; *York v. Pease*, 2 Gray, 282; *Green v. Gould*, 3 Allen, 465; *Cronan v. Cotting*, 99 Mass. 334; *People v. Mather*, 4 Wend. 229; *Walker v. Dunsbaugh*, 20 N. Y. 170; *Stevens v. Benton*, 39 How. (N. Y.) Pr. 13; *Bank of North. Liberties v. Davis*, 6 Watts & S. 285; *Parmelee v. Austin*, 20 Ill. 35; *Towns v. Alford*, 2 Ala. 378; *Blevins v. Pope*, 7 Ala. 371; *Smith v. Hutchings*, 30 Mo. 380; *Leonard v. Wynn*, 1 Week. Notes of Cases, 189. *Infra*, § 730.

³ *Bowman v. Bowman*, 2 M. & Rob. 501. *Infra*, §§ 723-730.

⁴ *Infra*, §§ 549-50.

whom, under the new practice, opposing parties may call to testify as to handwriting or other material facts.¹

§ 501. Nor does the rule preclude a party from refreshing the memory even of friendly witnesses when the tendency of the question is to lead the witness to the topic rather than to exhibit the topic to the witness.² A witness, for instance, in that confusion of memory so common when a forced effort is made to recall names or formulas, may have a name given to him, so that he may recognize that which he is striving to recollect.³ Of this we have several illustrations in the Tichborne prosecution. Nor can we do otherwise than permit questions involving specifications to be put to persons whose mental associations are feeble; for while such persons may narrate with extraordinary truth whatever they recollect, they may not be able to recollect unless the topic be presented to them in the concrete.⁴

§ 502. So a leading question is permitted when this form is the natural mode of bringing out categorically the information required.⁵ A person whose identification is at issue may be in a court room. The proper question in most cases undoubtedly is to ask the witness, "Is the person in question now in the court room, if so point him out." But when there is a prisoner in the dock charged with an offence, to tell a witness to look round the court room and see whether he can pick out the person to be identified, would be virtually to tell him to look at the person in the dock and ask him whether the prisoner is the person in question. In such cases it is therefore admissible to put the latter question directly.⁶

¹ *Clark v. Saffery*, Ry. & M. 126; *Foster*, in re, 44 Vt. 570; *Brubacker v. Taylor*, 76 Penn. St. 83. See *Holbrook v. Mix*, 1 E. D. Smith, 154. See supra, § 489.

² *Courteen v. Touse*, 1 Camp. 43; *Gunter v. Watson*, 4 Jones L. 455.

³ *Acerro v. Petroni*, 1 Stark. Rep. 100; *Kemmerer v. Edelman*, 23 Penn. St. 143.

⁴ *Edmonds v. Walker*, 3 Stark. 7; *Huckins v. Ins. Co.* 31 N. H. 238; *Moody v. Rowell*, 17 Pick. 498; *Che-*

ney v. Arnold, 18 Barb. 434; *Boothby v. Brown*, 40 Iowa, 104; *Lowe v. Lowe*, 40 Iowa, 220; *Donnell v. Jones*, 13 Ala. 490; *Long v. Steiger*, 8 Tex. 460.

⁵ *Spear v. Richardson*, 37 N. H. 23; *Hale v. Taylor*, 45 N. H. 405; *Potter v. Bissell*, 3 Lansing, 205; *Knapp v. Smith*, 27 N. Y. 277; *Wilson v. McCullough*, 23 Penn. St. 440; *Cogley v. Cushman*, 16 Minn. 397; *Adams v. Harrold*, 29 Ind. 198.

⁶ *R. v. Berenger*, 2 Stark. R. 129,

§ 503. So, also, when a witness is called to rebut statements to his discredit made by witnesses on the opposite side, he may be asked specifically whether he said or did the particular things with which he is charged.¹

So when witness is called to contradict.

§ 504. Nor is it necessary for counsel to begin even with a willing witness with a series of inquiries to elicit the uncontested conditions of a case. It is admissible to assume such of these conditions as are undisputed; and this may be done by way of recapitulation to questions addressed to the witness.² Such recapitulation, however, cannot introduce facts not in evidence.³

So when certain postulates are assumed.

§ 505. A trial might be mischievously delayed if a party were permitted to call all the witnesses he chooses to prove any one particular relevant point; and consequently, when such point appears to the court to be satisfactorily established, the further calling of witnesses to prove it may be stopped; subject, however, to the right to recall should the point be subsequently disputed.⁴ The court also, has a discretionary power to limit the examination and cross-examination of witnesses as to collateral or merely cumulative issues, as well as to shape the order in which evidence is to be produced.⁵

Court has discretion as to cumulation of witnesses and of examination.

§ 506. The mode and tone of examination are necessarily subject to the discretion of the court trying the case.⁶

So as to mode of examination.

§ 507. Ordinarily a witness cannot be asked as to a conclusion of law. Sometimes this has been so far pressed as to involve

n; *R. v. Watson*, 32 How. St. Tr. 74.

¹ See *Hallett v. Cousens*, 2 M. & R. 238. *Infra*, § 569.

² *Nicholls v. Dowding*, 1 Stark. R. 81; *People v. Mather*, 4 Wend. 229; *Strawbridge v. Spann*, 8 Alabama, 820.

³ *Baltimore R. R. v. Thompson*, 10 Md. 76; *Carpenter v. Ambrosion*, 20 Ill. 170; *People v. Graham*, 21 Cal. 261.

⁴ *Bunnell v. Butler*, 23 Conn. 65; *Bissell v. Cornell*, 24 Wend. 354; *An-*

thony v. Smith, 4 Bosw. (N. Y.) 503; *Gray v. St. John*, 35 Ill. 222.

⁵ *Wright v. Foster*, 109 Mass. 57; *Peck v. Richmond*, 2 E. D. Smith, 380; *Duncan v. McCullough*, 4 Serg. & R. 480; though see *Eames v. Eames*, 41 N. H. 177; *Mulhollin v. State*, 7 Ind. 646; *Dodge v. Dunham*, 41 Ind. 188; *Mix v. Osby*, 62 Ill. 193; *Morein v. Solomons*, 7 Rich. 97; *Adrianee v. Arnot*, 31 Mo. 471; *Crosett v. Whelan*, 44 Cal. 200.

⁶ *Schuchardt v. Allens*, 1 Wall. 359; *Rea v. Missouri*, 17 Wall. 542; *Com-*

the assumption that a witness cannot be asked as to conclusions of fact. The error of this assumption will be seen when we remember that there are few statements of fact that are not conclusions of fact.¹ It is otherwise as to conclusions of law, which, so far as concerns domestic law, are for the court to draw and not for witnesses.² Among such conclusions of law, legal responsibility is one of the most conspicuous. A witness, no matter how skilful, is not to be permitted to testify as to whether or no a party is responsible to the law;³ or whether certain facts constitute in law an agency.⁴ Nor is even an expert allowed to state whether he considered a deceased person competent to make a will.⁵ It has also been held that an expert in insurance is not admissible to state whether certain conceded conditions, in respect to an insured building, affected the risk.⁶ It has been ruled, however, that an expert may state that it is the usage of insurance com-

v. Thrasher, 11 Gray, 57; *Bakeman v. Rose*, 14 Wend. 105; *Magee v. State*, 32 Ala. 575; *Orr v. State*, 18 Ark. 540.

¹ See this shown in *Whart. Cr. Law*, § 733 *et seq.*, and *supra*, § 15; *infra*, § 509.

² *Campbell v. Rickards*, 4 B. & A. 840; *Rawlins v. Desboro*, 2 M. & Rob. 329; *Bennett v. Clemence*, 6 Allen, 10; *Cutler v. Carpenter*, 1 Cow. 81; *Braman v. Bingham*, 26 N. Y. 483; *Rawls v. Ins. Co.* 27 N. Y. 282; *First Baptist Church v. Ins. Co.* 28 N. Y. 153; *Fisher v. Derbert*, 54 Penn. St. 460; *Thistle v. Frostburg*, 10 Md. 129; *Massure v. Noble*, 11 Ill. 531; *White v. Bailey*, 10 Mich. 155; *Phelps v. Town*, 14 Mich. 374; *Alton R. R. v. Northcott*, 15 Ill. 49; *Tomlin v. Hilyard*, 43 Ill. 300; *McClay v. Hedge*, 18 Iowa, 66; *Parker v. Haggerty*, 1 Ala. 632; *Wall v. Williams*, 11 Ala. 826; *Dunlap v. Hearn*, 37 Miss. 471; *Young v. Power*, 41 Miss. 197; *Zeringue v. White*, 4 La. An. 301; *Garrett v. State*, 6 Mo. 1; *Lindauer v. Ins. Co.* 13 Ark. 461; *Winter v. Stock*, 29 Cal. 407.

³ *R. v. Richards*, 1 F. & F. 87;

Joyce v. Ins. Co. 45 Me. 168; *Peterson v. State*, 47 Ga. 524; *State v. Klinger*, 46 Mo. 224.

⁴ *Short Mt. Coal Co. v. Hardy*, 114 Mass. 191; *Prov. Tool Co. v. Man. Co.* 120 Mass. 35.

⁵ *Fairchild v. Bascomb*, 35 Vt. 398; *Walker v. Walker*, 34 Ala. 469.

⁶ *Marshall v. Ins. Co.* 7 Fost. (N. H.) 157; *S. C. Bennett's Ins. Cas.* 634; *Luce v. Ins. Co.* 105 Mass. 298; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72; *Hill v. Ins. Co.* 2 Mich. 476; *S. C. Bennett's Ins. Cas.* 325; though see *Schenck v. Ins. Co.* 4 Zab. 447; *Kern v. Ins. Co.* 40 Mo. 19; *Arnould on Ins.* 571.

In *Hill v. Lafayette Insurance Co.* 2 Mich. 476, *Wing, P. J.*, said: "But in reference to this class of cases, it appears to be unsettled, both in England and in the United States, whether witnesses can be receivable to state their views in relation to the materiality of facts withheld from insurers, at the time of the execution of the policy. The following cases are opposed to the reception of such evidence: 3

panies to charge a higher rate for certain conditions.¹ "Law,"

Burrow R. 1905; 1 Holt N. P. 243; 5 Barn. & Adolphus, 840; 2 M. & W. 267. The following cases favor its reception: 1 Arnould on Ins. 571; 2 Starkie's R. 229; 4 B. & P. 151; 4 East, 590; 10 B. & C. 527; 10 Bing. 57.

"In this country, the following cases are opposed to such evidence: 2 Green. Ev. sec. 397; 1 Ib. sec. 441; 7 Wend. 72; 17 Ib. 137, 164; 4 Denio, 311; 23 Wend. 425. In favor of its admission are Kent's Com. vol. 3, p. 484, in note; Duer on Insurance, 683, 684, and note, page 780.

"Mr. Smith, in his *Leading Cases*, vol. 1, pages 544, 545 (Am. edition, by Hare & Wallace), after citing and discussing all the English cases upon this point, remarks, that 'such being the state of the authorities, the question of admissibility can be hardly, even now, considered as settled. The difference is, however, perhaps less upon any point of law, than on the application of the settled law to certain states of facts; for, on the one hand, it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it; while, on the other hand, it does not seem to be intended that the opinion of witnesses can be received when the inquiry is into a subject matter, the nature of which is

not such as to require any particular habits or study in order to qualify a man to understand it. The author proceeds: 'Now the question of materiality in an assurance seems one which may possibly happen to fall within either of the above two classes; for it is submitted that it may happen in cases of sea policies that a communication, the materiality of which is in question, may be one respecting the importance of which no one, except an underwriter, can in all probability form a correct conclusion.'

"Let us apply these principles to this case. The witnesses state that the fact of a 'pending litigation was material to the risk;' the reason given is, that 'if known to the insurer, it would have increased the premium, or led to a total objection of the risk, because the assured might be tempted to fire his own building, or neglect it,' &c.

"It appears to me that the reason given by these witnesses shows that it is not a question of science or skill, or which requires peculiar habits or experience to enable a person to perceive or understand it. It is a mere deduction of reason from a fact, founded on the common experience of mankind, that a man may be tempted to do wrong, when placed in circumstances where his cupidity may be excited. A jury does not need evidence to convince them that this may be the effect. As well might a court receive the evidence of judges and officers of court against a man indicted for a crime, that men generally act as the prisoner is charged to have done when placed

¹ *Mulry v. Ins. Co.* 5 Gray, 541; *Lyman v. Ins. Co.* 14 Allen, 329; *Hartman v. Ins. Co.* 21 Penn. St. 466. As to parallel cases, see *Porter v. Pequon-*

noe Co. 17 Conn. 249; *Buffum v. Harris*, 5 R. I. 243; *Clegg v. Fields*, 7 Jones L. (N. C.) 37. *Supra*, § 444.

in the sense here used, embraces whatever conclusions belong properly to the court. Thus it is inadmissible, so has it been ruled in New Hampshire, for a witness to define the meaning of the term "minister of the congregational persuasion."¹ Nor can a witness give conclusions as to documents which it is the province of the court to interpret.²

§ 508. A witness, also, is not to be permitted to testify as to the motives by which another person is or has been actuated. Motives are eminently inferences from conduct. The facts from which the inferences are to be drawn are to be detailed by the witnesses; for the jury the work of inference is to be reserved.³ Yet where a party is examined as to his own conduct, he may be asked as to his motive, his testimony to such motive being based not on inference but on consciousness.⁴

§ 509. So also as to the witness's opinion. It is true that we

under the like temptation and circumstances. A bare suggestion to the jury, of the very well understood connection between such a condition of things and its ordinary result, would enable them to apprehend the matter in all its bearings, and it would not need the testimony of witnesses to guide their minds to a proper conclusion as to its effects upon the risk. It is a matter addressed to the jury, which they must decide, and the evidence, whatever it may be, is not conclusive upon them. Arnould on Insurance, 442; 2 Greenleaf's Ev. sec. 378; 1 Ib. sec. 441. Here the witnesses swear that the fact disclosed 'would have increased the risk,' &c. This, the jury is to determine under all the circumstances of the case."

¹ Dublin case, 38 N. H. 459.

² Infra, § 972.

³ Zantzinger v. Weightman, 2 Cranch C. C. 478; Whitman v. Freeze, 23 Me. 185; State v. Mairs, 1 Cox, 453; Ballard v. Lockwood, 1 Daly, 158; Shepherd v. Willis, 19 Oh. 142; Gilman v. Riopelle, 18 Mich.

145; State v. Garvey, 11 Minn. 154; Hudgins v. State, 2 Ga. 173; Hawkins v. State, 25 Ga. 207; Peake v. Stout, 8 Ala. 647; Clement v. Cureton, 36 Ala. 120.

⁴ Supra, § 482; Quimby v. Morrill, 47 Me. 470; Fisk v. Chester, 8 Gray, 506; Lombard v. Oliver, 7 Allen, 155; Forbes v. Waller, 25 N. Y. 430; Persse v. Willett, 1 Rob. N. Y. 131; though see Thornton v. Thornton, 39 Vt. 122; Haywood v. Foster, 16 Oh. 88.

"The plaintiff, being by law a competent witness, was rightly allowed by law to testify to any fact which had a bearing on the issue before the jury. Inasmuch as the defendant sought to impeach the plaintiff's conveyance to his wife on the ground that it was made with a fraudulent purpose, an inquiry into his intentions and motives in making the grant to her was relevant and material. The interrogatory put to him on this subject was therefore competent, and his testimony, that he executed the conveyance in good faith, was admissible." Bigelow, C. J., Thacher v. Phinney, 7 Allen, 148.

here strike a topic which is embarrassed by much ambiguity of terms. What is *opinion*? "Did A. shoot B.?" C., a bystander, answers, "My opinion is that he did: I saw the pistol aimed; I heard the report; I saw the flash; I saw B. fall down, as I supposed, dead; from all this I infer that A. killed B." This is all inference on the part of the witness; yet it is admissible.¹ On the other hand it has been held inadmissible to ask a witness as to his opinion as to who constitute the membership of a firm;² or as to whether a certain physician had acted honorably towards his professional brother;³ or as to what is a reasonable load for a horse;⁴ or as to the effect of particular charges in an account;⁵ or as to the effect of certain acts on the credit of a firm;⁶ or as to the probable effect of certain acts in saving a burning house;⁷ or as to the religious sense of a dying declarant;⁸ or as to the conjectural losses of certain business operations;⁹ or as to whether the condition of a third person indicates disease.¹⁰ Nor can a witness be asked whether he did not exercise great care in the discharge of a certain duty;¹¹ as to whether a particular alteration of machinery was technically a repair;¹² as to whether a certain person acted fairly;¹³ as to whether a certain religious denomination had a particular creed, but had departed from it;¹⁴ as to whether an engine appeared capable of drawing a train;¹⁵ as to whether a certain bridge was safe;¹⁶ as to whether certain conduct indicated adultery;¹⁷ as to whether a certain disorderly house was a nuisance;¹⁸ as to whether a certain person's conduct

Opinion of witness cannot ordinarily be asked.

¹ See Whart. Cr. Law, 7th ed. § 733. See supra, §§ 8, 15.

² Bonfield v. Smith, 12 M. & W. 405; Williams v. Soutter, 7 Iowa, 435; Atwood v. Meredith, 37 Miss. 635.

³ Ramadge v. Ryan, 9 Bing. 333; though see Greville v. Chapman, 5 Q. B. 731, a case of doubtful authority.

⁴ Oakes v. Weston, 45 Vt. 430.

⁵ U. S. v. Willard, 1 Paine, 539.

⁶ Donnell v. Jones, 13 Ala. 490; Thomas v. Isett, 1 Greene, 470.

⁷ Gibson v. Hatchett, 24 Ala. 201.

⁸ State v. Brunetto, 13 La. An. 45.

⁹ Rider v. Ins. Co. 20 Pick. 259.

¹⁰ Ashland v. Marlboro, 99 Mass. 47; though in Parker v. St. Co. 109 Mass. 506, it was held that a non-expert could testify as to another's probable health.

¹¹ Bryant v. Glidden, 39 Me. 458.

¹² Bigelow v. Collamore, 5 Cush. 226.

¹³ Zautzinger v. Weightman, 2 Cranch C. C. 478.

¹⁴ Happy v. Morton, 33 Ill. 398.

¹⁵ Sisson v. R. R. 14 Mich. 489.

¹⁶ Crane v. Northfield, 33 Vt. 124.

¹⁷ Cameron v. State, 14 Ala. 546; Cox v. Whitfield, 18 Ala. 738.

¹⁸ Smith v. Com. 6 B. Monr. 21.

would have particular effects;¹ as to whether certain language would have particular effects;² as to whether certain conduct was negligent, or otherwise;³ as to whether certain conduct was honest;⁴ as to whether a deed was unduly influenced;⁵ as to whether a certain party was insolvent;⁶ as to whether a certain house was a suitable residence for a particular person;⁷ as to whether a gate of a drawbridge should be shut at night;⁸ as to whether certain injuries could have been avoided;⁹ as to whether a certain floating dock was seaworthy;¹⁰ or as to whether certain articles were proper for a minor.¹¹

§ 510. The true line of distinction is this: an inference necessarily involving certain facts may be stated without the facts, the inference being an equivalent to a specification of the facts; but when the facts are not necessarily involved in the inference (*e. g.* when the inference may be sustained upon either of several distinct phases of fact, neither of which it necessarily involves), then the facts must be stated.¹² In other words, when the opinion

¹ *Richards v. Richards*, 37 Penn. St. 225.

² *Johnson v. Ballew*, 2 Porter, 29.

³ *Crofut v. Ferry Co.* 36 Barb. 201; *Teall v. Barton*, 40 Barb. 137; *Otis v. Thom*, 23 Ala. 469; *Taylor v. Monnot*, 4 Duer, 116; *Livingston v. Cox*, 8 Watts & S. 61. See Penn. R. v. *Henderson*, 51 Penn. St. 315.

⁴ *Johnson v. State*, 35 Ala. 370.

⁵ *Dean v. Fuller*, 40 Penn. St. 474.

⁶ *Nuckolls v. Pinkston*, 38 Ala. 615; *Babcock v. Bank*, 28 Conn. 302; though see *Sherman v. Blodgett*, 28 Vt. 149; *Crawford v. Andrews*, 6 Ga. 244; *Riggins v. Brown*, 12 Ga. 271; *Royall v. McKenzie*, 25 Ala. 363.

⁷ *Dallas v. Sellers*, 17 Ind. 479.

⁸ *Nowell v. Wright*, 3 Allen, 166.

⁹ *Winters v. R. R.* 39 Mo. 468. See *Patterson v. Colebrook*, 29 N. H. 94.

¹⁰ *Marcy v. Ins. Co.* 11 La. An. 748.

¹¹ *Merritt v. Seaman*, 6 N. Y. 168.

¹² *Lime Rock Bk. v. Hewett*, 50 Me. 267; *Robertson v. Stark*, 15 N.

H. 109; *Kingsbury v. Moses*, 45 N. H. 222; *Spear v. Richardson*, 34 N. H. 428; *Lester v. Pittsford*, 7 Vt. 161; *Frazer v. Tupper*, 29 Vt. 409; *Bank of Middlebury v. Rutland*, 33 Vt. 414; *Dickinson v. Barber*, 9 Mass. 225; *Robinson v. R. R.* 7 Gray, 92; *Lewis v. Ins. Co.* 10 Gray, 508; *Carpenter v. Leonard*, 3 Allen, 32; *Bliss v. Wilbraham*, 8 Allen, 564; *Morse v. State*, 6 Conn. 9; *Gibson v. Williams*, 4 Wend. 320; *Paige v. Hazard*, 5 Hill (N. Y.) 603; *Moorehouse v. Mathews*, 2 Comst. 514; *Cook v. Brockway*, 21 Barb. 331; *Strevel v. Hempstead*, 44 Barb. 518; *Given v. Albert*, 5 Watts & S. 333; *Woodburn v. Bank*, 5 Watts & S. 447; *Leckey v. Bloser*, 24 Penn. St. 401; *Bank of U. S. v. Macalester*, 9 Penn. St. 475; *Carr v. Northern Liberties*, 35 Penn. St. 324; *Stanfield v. Phillips*, 78 Penn. St. 73; *U. S. Telegraph Co. v. Wenger*, 56 Penn. St. 262; *Law v. Scott*, 5 Har. & J. 438; *Mahoney v. Ashton*, 4 Har. & M. 63; *Elbin v. Wilson*, 33 Md. 135; *Cincinnati Ins. Co. v. May*, 20 Ohio,

is the mere short-hand rendering of the facts, then the opinion can be given, subject to cross-examination as to the facts on which it is based.¹

§ 511. *A fortiori* whenever a condition of things is such that it cannot be reproduced and made palpable in the concrete to the

211; *Adams v. Funk*, 53 Ill. 219; *Williams v. Dewitt*, 12 Ind. 309; *Daniels v. Mosher*, 2 Mich. 183; *Evans v. People*, 12 Mich. 27; *Whittemore v. Weiss*, 33 Mich. 348; *Wilson v. Maddock*, 5 Oregon, 480; *U. S. Ex. Co. v. Anthony*, 5 Kans. 490; *Shepard v. Pratt*, 16 Kans. 209; *Bailey v. Poole*, 13 Ire. L. 404; *Bell v. Morrisett*, 6 Jones L. 178; *Mealing v. Pace*, 14 Ga. 596; *Inglehart v. State*, 16 Ga. 513; *Keener v. State*, 18 Ga. 194; *South. Life Ins. Co. v. Wilkinson*, 53 Ga. 535; *Parker v. Chambers*, 24 Ga. 518; *Hook v. Stovall*, 30 Ga. 418; *Massey v. Walker*, 10 Ala. 288; *Cameron v. State*, 14 Ala. 546; *Saltmarsh v. Bower*, 34 Ala. 613; *Gregory v. Walker*, 38 Ala. 26; *Hall v. State*, 40 Ala. 698; *Cooper v. State*, 23 Tex. 331.

"As a rule, witnesses must state facts, and not draw conclusions or give opinions. It is the duty of the jury or court to draw conclusions from the evidence, and form opinions upon the facts proved. The cases in which opinions of witnesses are allowable, constitute exceptions to the general rule, and the exceptions are not to be extended or enlarged, so as to include new cases, except as a necessity to prevent a failure of justice, and when better evidence cannot be had. On questions of science or trade, and the like, persons of skill and science, experts in the particular science or trade, may give opinions. 1 Greenl. Evid. § 440; 1 Phil. Ev. 290. On questions of value, a witness must often be permitted to testify to an opinion as to value, but the witness must be shown competent to speak upon the subject.

He must have dealt in, or have some knowledge of, the article concerning which he speaks. C. & H. Notes, 760, Note 529. Persons should be conversant with the particular article, and of its value in the market, as a farmer or a dealer, or a person conversant with the article, as to the value of lands, cattle, produce, &c. These stand upon the general ground of peculiar skill and judgment in the matters about which opinions are sought. Per Nelson, Ch. J., *Lincoln v. Schenectady & Saratoga R. R. Co.* 23 W. R. 433; *Brill v. Flagler*, 23 Wend. 354; *Norman v. Wells*, 17 Wend. 136; *Lamoure v. Caryl*, 4 Denio, 370.

"It is not permitted to give in evidence the opinion of witnesses having knowledge of the subject, as to the damages resulting from a particular transaction. *Morehouse v. Mathews*, 2 Comstock, 514; *Lincoln v. R. R. Co.* supra." Allen, J., *Teerpenning v. Insurance Co.* 43 N. Y. 281.

¹ *Taylor v. R. R.* 48 N. H. 304; *Sherman v. Blodgett*, 28 Vt. 119; *Pearsons v. Ins. Co.* 16 Gray, 463; *Clearwater v. Brill*, 61 N. Y. 625; *Ardesco v. Gilson*, 63 Penn. St. 146; *Sorg v. Congregation*, 63 Penn. St. 156; *King v. Fitch*, 2 Abb. (N. Y.) App. 508; *Selden v. Bank*, 3 Minn. 166; *Montgomery v. Scott*, 34 Wise. 338; *Lewis v. State*, 49 Ala. 1; *Avary v. Searcy*, 50 Ala. 54; *Ray v. State*, 50 Ala. 104; *Sparr v. Wellman*, 11 Mo. 230; *Sayfarth v. St. Louis*, 52 Mo. 449; *State v. Folwell*, 14 Kans. 110. See *Chicago v. Greer*, 9 Wall. 726.

jury, or when language is not adequate to such realization, then a witness may describe it by its effect on his mind, even though such effect be opinion.¹ Eminently is this the case with regard to noises;² and smells,³ and to questions of identification, where a witness is allowed to speak as to his opinion or belief.⁴

§ 512. So an opinion can be given by a non-expert as to matters with which he is specially acquainted, but which cannot be specifically described.⁵ Thus a witness has been permitted to testify that certain parties were attached to each other;⁶ that a culvert was "steep right down, a culvert that I thought a dangerous place;"⁷ that an engine was running at an estimated speed;⁸ that a third person was sick or disabled;⁹ that a third person was responsible for his debts;¹⁰ that a horse appeared unwell or unsound, or was or was not diseased;¹¹ that a cow was in good condition;¹² that certain pictures were good likenesses;¹³ that cer-

¹ *Com. v. Sturtivant*, 117 Mass. 122; *Safford v. Grout*, 120 Mass. 20; *Com. v. Piper*, 120 Mass. 186; *Kearney v. Farrell*, 28 Conn. 317; *People v. Eastwood*, 14 N. Y. 562; *Townsend v. Brundage*, 6 Thomp. & C. (N. Y.) 527; *Dubois v. Baker*, 40 Barb. 556; *Brennan v. People*, 15 Ill. 111; *State v. Langford*, *Busbee (L.)*, 436; *Woodward v. Gates*, 38 Ga. 205; *Patrick v. The Adams*, 19 Mo. 73; *Eyerma v. Sheehan*, 52 Mo. 221; *Albright v. Corley*, 40 Tex. 105; *Underwood v. Waldron*, 33 Mich. 232.

² *State v. Shinborn*, 46 N. H. 497; *Leonard v. Allen*, 11 Cush. 241, where the meaning of tones of voice and gestures was asked. See, however, *Hardenburg v. Cockroft*, 5 Daly, 79, where it was said a witness could not be asked as to how far a voice could be heard.

³ *Kearney v. Farrell*, 28 Conn. 317. See Max Müller's *Lectures on Language*, vol. ii. Lect. 1.

⁴ *Fryer v. Gathercole*, 13 Jur. 542; *R. v. Orton*, Pamph. Trial; *State v. Pike*, 49 N. H. 398; *Com. v. Pope*, 103 Mass. 446; *Powell's Evidence* (4th ed.), 102.

⁵ *Kearney v. Farrell*, 28 Conn. 317; *Bennett v. Fail*, 26 Ala. 605; *Cole v. Varner*, 31 Ala. 244; *Innis v. The Senator*, 4 Cal. 5.

⁶ *Trelawney v. Colman*, 2 Stark. R. 192; *Robertson v. Stark*, 15 N. H. 114; *McKee v. Nelson*, 4 Cow. 355.

⁷ *Lund v. Tyngsboro*, 9 Cush. 36.

⁸ *Detroit R. R. v. Van Steinburg*, 17 Mich. 99.

⁹ *State v. Knapp*, 45 N. H. 148-9; *Whittier v. Franklin*, 46 N. H. 23; *Norton v. Moore*, 3 Head, 480; *Brown v. Lester*, Ga. Dec. Part I. 77; *Milton v. Rowland*, 11 Ala. 732; *Autauga Co. v. Davis*, 32 Ala. 703; *Barker v. Coleman*, 35 Ala. 221; *Stone v. Watson*, 37 Ala. 279; *Elliott v. Van Buren*, 33 Mich. 49; *Endicott, J., Com. v. Sturtivant*, 119 Mass. 132.

¹⁰ *Blanchard v. Mann*, 1 Allen, 433.

¹¹ *Willis v. Quimby*, 31 N. H. 485; *Spear v. Richardson*, 34 N. H. 428; *State v. Avery*, 44 N. H. 392; *Johnson v. State*, 37 Ala. 457. See these cases approved in *Pike v. State*, 49 N. H. 426.

¹² *Joy v. Hopkins*, 5 Denio, 84.

¹³ *Barnes v. Ingalls*, 39 Ala. 193.

tain hairs on a club appeared to the naked eye human, and to resemble the hair of the deceased ;¹ that a certain substance was "hard pan ;"² that certain distances or weights were to be estimated in a particular way ;³ that certain persons were insane, or drunk, or otherwise ;⁴ that certain obviously dangerous wounds caused death ;⁵ that a liquor looked like whiskey ;⁶ that a color was of a certain hue ;⁷ that a certain place was a "mill-site ;"⁸ that another person "acted as if she felt very sad ;"⁹ that the weather was cold enough to freeze potatoes ;¹⁰ that the appearance of a blood-stain indicated the spurt came from below, though the witness had never experimented with blood or other fluid in this relation.¹¹ So, as a general rule, "duration, distance, dimension, velocity, &c., are often to be proved only by the opinion of witnesses, depending as they do upon many minute circumstances which cannot fully be detailed."¹²

¹ *Com. v. Dorsey*, 103 Mass. 413.

² *Currier v. R. R.* 34 N. H. 498.

³ *Hackett v. R. R.* 35 N. H. 390; *Eastman v. Amoskeag Co.* 44 N. H. 143; *Fulsome v. Concord*, 46 Vt. 135; *Campbell v. State*, 23 Ala. 44; *Rawles v. James*, 49 Ala. 183.

⁴ See *supra*, § 45; *Gahagan v. R. R.* 1 Allen, 187; *People v. Eastwood*, 14 N. Y. 562; *Stanley v. State*, 26 Ala. 26.

⁵ *State v. Smith*, 22 La. An. 468.

⁶ *Com. v. Dowdican*, 114 Mass. 257.

⁷ *Com. v. Owens*, 114 Mass. 252.

⁸ *Clagett v. Easterday*, 42 Md. 617.

⁹ *Culver v. Dwight*, 6 Gray, 444.

¹⁰ *Curtis v. R. R.* 18 Wise. 312.

¹¹ *Com. v. Sturtivant*, 119 Mass. 132, where the question is discussed with comprehensive ability by Endicott, J.

¹² *Kingman, C. J.*, *State v. Folwell*, 14 Kans 110; citing *Poole v. Richardson*, 3 Mass. 330. See, also, *Com. v. Malone*, 114 Mass. 295.

"While it is the general rule that the opinions of witnesses are not evidence, there are certain classes of ex-

ceptions to it, in which such opinions are admissible in connection with facts testified to, on which they are founded. Certain instances of such exceptions are noticed in the following decisions made by this court: In *Porter v. Pequonnoc Manufacturing Co.* 17 Conn. 249, the question was whether a certain dam was capable of sustaining the water accumulated by it suddenly in time of a freshet. Upon that point the court received the opinions of witnesses who had no peculiar skill in the mode of constructing dams, but who were acquainted with the stream and who knew the height of the dam and depth of the pond. The court said: 'The judgment or opinion of these witnesses, as practical and observing men, was sought on this point, on the facts within their knowledge and to which they testified. They had acquired, by their personal observation, a knowledge of the character of the stream and also of the dam, and were therefore peculiarly qualified to determine whether the latter was sufficiently strong to withstand the former. The opinions of such persons upon a

§ 513. In fine, in addition to the rule already given that opinion is admissible when it is fact in short-hand, it is not nec-

question of this description, although possessing no peculiar skill on the subject, would ordinarily be more satisfactory to the minds of the triers than those of scientific men who were personally unacquainted with the facts in the case; and to preclude them from giving their opinion on the subject, in connection with the facts testified to by them, would be to close an ordinary and important avenue to the truth. . . . On such a question the judgment of ordinary persons, having an opportunity of personal observation, and testifying to the facts derived from that observation, was equally admissible, whatever comparative weight their opinions might be entitled to, of which it would be for the jury to judge. It was a question of common sense as well as of science.' In *Dunham's Appeal from Probate*, 27 Conn. 192, this court said: 'We never allow the mere opinion of the witness to go to the jury if objected to, unless the witness is an expert and testifies as such, where the jury, from want of experience or observation, are unable to draw proper inferences from facts proved. But where a witness speaks from his personal knowledge, and, after stating the facts, adds his opinion upon them, or in a certain class of cases gives his opinion without detailing the facts on which it is founded, his testimony is received as founded, not on his judgment, but on his knowledge. . . . So, a witness may state that a certain road is or is not in repair, or that a certain bridge is sound and safe or otherwise, or that a farm or horse is worth so much, without going into the particular facts on which he founds his opinion, these facts being known to him personally. He only states the result of his own

observation and knowledge.' " *Clinton v. Howard*, 42 Conn. 306, 307. *Pardee, J.*

In *Hardy v. Merrill*, decided by the supreme court of New Hampshire, in 1875, 8 Am. Law T. Rep. 385, the following valuable classification of authorities appears in the opinion of the court:—

"It is proper for me to invite attention to the history of what I have called the Massachusetts exception. Beginning with *Poole v. Richardson*, 3 Mass. 330 (A. D. 1807), we find no very wide departure from the general rule of admissibility. The case holds that non-professional witnesses may 'not testify merely their opinion or judgment.' Judge Doe (*State v. Pike*, p. 410) suspects that 'the only point ruled in this case was, that the witnesses were allowed to give their opinions when they stated particular facts from which the state of the testator's mind was inferred by them.'

"But the exception grew and dilated, finding larger and stronger expressions along through the years and the course of the cases of *Hathorn v. King*, 8 Mass. 371; *Dickinson v. Barber*, 9 Mass. 225; *Needham v. Ide*, 5 Pick. 510; *Com. v. Wilson*, 1 Gray, 337; down to *Com. v. Fairbanks*, 2 Allen, 511 (A. D. 1861), when it was held *per curiam*, 'that the incompetency of the opinions of non-experts, was not an open question in Massachusetts;' though Judge Thomas had recently said, in *Baxter v. Abbott*, 7 Gray, 79, that 'if it were a new question [he] should be disposed to allow every witness to give his opinion, subject to cross-examination upon the reasons upon which it is based, his degree of intelligence, and his means of observation.'

essary for a witness to be an expert, to enable him to give his opinion as to a matter depending upon special knowledge, when

“ In very recent times, however, we observe a more liberal disposition on the part of the Massachusetts courts. See *Barker v. Comins*, 110 Mass. 477 (A. D. 1872) ; and *Nash v. Hunt*, 116 Mass. 237 (A. D. 1874). In the former of these cases, it was held that persons acquainted with the testator, although neither witnesses to the will nor medical experts, may testify whether they noticed any change in his intelligence, and any want of coherence in his remarks. Gray, J., said : ‘ The question did not call for the expression of an opinion upon the question whether the testator was of sound or unsound mind, which the witnesses, not being either physicians or attesting witnesses, would not be competent to give. The question whether there was an apparent change in a man’s intelligence or understanding, or a want of coherency in his remarks, is a matter not of opinion but of fact, as to which any witness may testify, in order to put before the court or jury the acts and conduct from which the degree of his mental capacity may be inferred.’

“ In *Nash v. Hunt*, a witness was allowed to say he observed no incoherence of thought in the testator, nor anything unusual or singular in respect to his mental condition. Judge Wells saying, — ‘ We do not understand this to be giving an opinion as to the condition of the mind itself, but only of its manifestations in conversation with the witness.’ The witness could state, ‘ as matter of observation, whether his conversation and demeanor were in the usual and natural manner of the testator or otherwise ;’ and in *Commonwealth v. Pomeroy*, 117 Mass. 149, non-professional witnesses were allowed to state, without

objection, that the prisoner, ‘ in conversation and manner, evinced no remorse or sense of guilt.’

“ With deference and great respect I may be allowed to say that I rejoice much more in the results attained in these later cases than in the *modus operandi* of judicial reasoning by which the conclusions were reached. They indicate decided and accelerating progress of the Massachusetts courts to the right direction. The full establishment of the true doctrine there is a question of time only.

“ A tolerably careful investigation authorizes me to repeat the language of Judge Doe, that ‘ in England no express decision of the point can be found, for the reason that such evidence has always been admitted without objection. It has been universally regarded as so clearly competent, that it seems no English lawyer has ever presented to any court any objection, question, or doubt in regard to it.’ *State v. Pike*, 49 N. H. 408, 409.

“ I presume, however, it will not be denied that in the ecclesiastical courts, where questions of testamentary capacity are generally tried, such opinions have always been received. See 1 Gr. Ev. (12th ed.) sec. 410, n. 4 ; *Dow v. Clark*, 3 Addams, 79 ; *Wheeler v. Alderson*, 3 Hagg. 574, where Sir John Nicholl said, in pronouncing his judgment, ‘ There is a cloud of witnesses who gave unhesitating opinions that the deceased was mad.’

“ The practice in the courts of the common law has been universal and unwavering in the same direction ; and ‘ the number of English authorities is limited only by the number of fully reported cases in which the question of sanity has been raised.’ *State v. Pike*, 49 N. H. 409.

he states the facts on which he bases his opinion.¹ It is otherwise as to matters concerning which the jury can themselves

"In the year 1800, James Hadfield was tried for shooting at King George III. The defence was insanity, and the opinions of non-expert witnesses were freely admitted; 27 State Trials, 1281 *et seq.*; and Mr. Erskine told the jury they 'ought not to be shaken in giving full credit to the evidence of those who . . . describe him as discovering no symptoms whatever of mental incapacity or disorder.' Erskine's Speeches (3d London ed.), 132, 140.

"In *Eggleton v. Kingston*, 8 Ves. Jr. 450, Ann Boak and Elizabeth Banson 'expressed a strong opinion of the total incapacity of the deceased, both from his great imbecility of mind and the dominion . . . of Mrs. Kingston;' and John Fogg testified that 'his faculties were very much impaired.'

"In *Lowe v. Jolliffe*, 1 W. Black. 365, the subscribing witnesses to a will having sworn that the testator was utterly incapable of making such an instrument, to encounter this evidence the plaintiff's counsel examined the friends of the testator, who strongly deposed to his sanity.

"In *Tatham v. Wright*, 2 Russ. & Mylne, Lord Ch. Jus. Tindal, 'in behalf of himself and the Lord Chief Baron,' in reading the judgment of the court, commented upon the fact that 'on the trial of this cause, for the

purpose of proving affirmatively the general incapacity of Mr. Marsden, a very large body of parol evidence was produced by the defendants in the issue, comprising not fewer than sixty-one witnesses in number, some of whom deposed to the state of Mr. Marsden's intellect and the powers of his mind in very early life, and others continued the account down to a period very shortly before his death in 1826.

"The greater part of this testimony came from non-professionals, and consisted in the expression of opinion.

"Courts and text-writers all agree that, upon questions of science and skill, opinions may be received from persons specially instructed by study or experience in the particular art or mystery to which the investigation relates.

"But without reference to any recognized rule or principle, all concede the admissibility of the opinions of non-professional men upon a great variety of unscientific questions arising every day, and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness, and health; questions, also, concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear,

¹ *Currier v. R. R.* 34 N. H. 498; *Richardson v. Hitchcock*, 28 Vt. 149; *O'Neill v. Lowell*, 6 Allen, 110; *Browning v. R. R.* 2 Daly, 117; *Iselin v. Peck*, 2 Robt. (N. Y.) 629; *Pennsylv. R. R. v. Henderson*, 51 Penn. St. 315; *Dailey v. Grimes*, 27 Md. 440; *Panton v. Norton*, 18 Ill. 496; *Thomas v. White*, 11 Ind. 132; *Indianapolis v.*

Huffer, 30 Ind. 235; *Detroit R. R. v. Van Steinburg*, 17 Mich. 19; *Sowers v. Dukes*, 8 Minn. 23; *Brackett v. Edgerton*, 14 Minn. 174; *Cochran v. Miller*, 13 Iowa, 128; *Barker v. Coleman*, 35 Ala. 221; *Blackman v. Johnson*, 35 Ala. 252; *Alabama R. R. v. Burkett*, 42 Ala. 83; *People v. Sanford*, 43 Cal. 29.

form opinions, in which cases witnesses cannot state opinions

excitement, intoxication, veracity, general character, and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention. See, in addition to the American cases cited by Judge Doe, in *State v. Pike*, *passim*, and the cases cited by the learned counsel for the appellant in argument, *Commonwealth v. Dorsey*, 103 Mass. 412; *McIntire v. McConn*, 28 Iowa, 480, 483; *Dickinson v. Dickinson*, 61 Pa. St. 404; *Boyd v. Boyd*, 66 Ibid. 283, 286, 290; *Pidcock v. Potter*, 68 Ibid. 351; 1 Wharton's Cr. Law, § 48.

"All evidence is opinion merely, unless you choose to call it fact and knowledge, as discovered by and manifested to the observation of the witness.

"And it seems to me quite unnecessary and irrelevant to crave an apology or excuse for the admission of such evidence, by referring it to any exceptions (whether classified, or isolated and arbitrary) to any supposed general rule, according to the language of some books and the custom of some judges. There is, in truth, no general rule requiring the rejection of opinions as evidence. A general rule can hardly be said to exist, which is lost to sight in an enveloping mass of arbitrary exceptions.

"But if a general rule will comfort any who insist upon excluding and suppressing truth, unless the expression of the truth be restrained within the confines of a legal rule, standard, or proposition, let them be content to adopt a formula like this: *Opinions of witnesses derived from observation are admissible in evidence, when, from the nature of the subject under investigation, no better evidence can be obtained.* No harm can result from such a rule, properly applied. It opens a door for

the reception of important truths which would otherwise be excluded, while, at the same time, the tests of cross-examination, disclosing the witness's means of knowledge, and his intelligence, judgment, and honesty, restrain the force of the evidence within reasonable limits, by enabling the jury to form a due estimate of its weight and value. See 1 Redf. on Wills, 136-141.

"Opinions concerning matters of daily occurrence, and open to common observation, are received from necessity; *Commonwealth v. Sturtivant*, 117 Mass.; and any rule which excludes testimony of such a character, and fails to recognize and submit to that necessity, tends to the suppression of truth and the denial of justice.

"The ground upon which opinions are admitted in such cases is, that, from the very nature of the subject in issue, it cannot be stated or described in such language as will enable persons, not eye-witnesses, to form an accurate judgment in regard to it. *De Witt v. Barly*, 17 N. Y. 340; *Bel lows, J., in Taylor v. Grand Trunk Railway*, 48 N. H. 309.

"How can a witness describe the weight of a horse? or his strength? or his value? Will any description of the wrinkles of the face, the color of the hair, the tones of the voice, or the elasticity of step, convey to a jury any very accurate impression as to the age of the person described? And so, also, in the investigation of mental and psychological conditions, — because it is impossible to convey to the mind of another any adequate conception of the truth by a recital of visible and tangible appearances; because you cannot, from the nature of the case, describe emotions, senti-

which do not themselves involve the facts from which they are drawn.¹

ments, and affections, which are really too plain to admit of concealment, but, at the same time, incapable of description, — the opinion of the observer is admissible from the necessity of the case; and witnesses are permitted to say of a person, ‘He seemed to be frightened;’ ‘He was greatly excited;’ ‘He was much confused;’ ‘He was agitated;’ ‘He was pleased;’ ‘He was angry.’ All these emotions are expressed to the observer by appearances of the countenance, the eye, and the general manner and bearing of the individual, — appearances which are plainly enough recognized by a person of good judgment, but which he cannot otherwise communicate than by an expression of results in the shape of an opinion. See Best on the Principles of Evidence, 585. It is on this principle, says Mr. Best, that testimony to character is received; as, where a witness deposes to the good or bad character of a party who is being tried on a criminal charge, or states his conviction that, from the general character of another witness, he ought not to be believed on his oath. Best on Ev. 657. ‘So,’ continues Mr. Best, ‘the state of an unproducible portion of *real* evidence, — as, for instance, the appearance of a building, or of a public document which the law will not allow to be brought from its repository, — may be explained by a term expressing a complex idea, *e. g.* that it looked old, decayed, or fresh; was in good or bad condition, &c. So, also, may the emo-

tions or feelings of a party whose psychological condition is a question. Thus, a witness may state as to whether, on a certain occasion, he looked pleased, excited, confused, agitated, frightened, or the like.’

“Considerations of this character controlled the opinion of the court in *De Witt v. Barly*, before cited. The learned judge, in delivering the opinion of the court, said: ‘To me it seems a plain proposition, that, upon inquiries as to mental imbecility arising from age, it will be found impracticable, in many cases, to come to a satisfactory conclusion, without receiving, to some extent, the opinions of witnesses. How is it possible to describe, in words, that combination of minute appearances upon which a judgment in such cases is formed? The attempt to try such a question, excluding all matter of opinion, would, in most cases, I am persuaded, prove entirely futile. . . . A witness can scarcely convey an intelligible idea upon such a question, without infusing into his testimony more or less of opinion. Mental imbecility is exhibited, in part, by attitude, by gesture, by the tones of the voice, and the expression of the eye and face. Can these be described in language so as to convey to one, not an eye-witness, an adequate conception of their force?’ — and see *Rand’s* note to *Poole v. Richardson*, 3 Mass. (*Rand’s* ed.) 330. . . .

“In *Darling v. Westmoreland*, 52 N. H. 401, 403, the defendants, argu-

¹ *Cannell v. Ins. Co.* 59 Me. 582; *Morris v. East Haven*, 41 Conn. 252; *Messner v. People*, 45 N. Y. 1; *Ames v. Snider*, 69 Ill. 376; *Bissell v. Wert*, 35 Ind. 54; *Eaton v. Woolly*, 28 Wise.

628; *State v. Thorp*, 72 N. C. 186; *Gavisk v. R. R.* 49 Mo. 274; *Shepherd v. Hamilton Co.* 8 Heisk. 380; *Largan v. R. R.* 40 Cal. 272.

§ 514. It is not to be expected that a witness should reproduce entire words that he has heard uttered by another even at a short

ing that evidence of Fletcher's horse being frightened was incompetent, suggested that, 'at best, it was evidence of an admission or a declaration, by Fletcher's horse, that the alleged obstruction looked frightful to him, and . . . not even a declaration under oath at that.' But the court, holding that the fright of Fletcher's horse was as competent as the fright of the plaintiff's, affirmed the doctrine of *Whittier v. Franklin*, 46 N. H. 23, that the fright of a horse might be proved by witnesses testifying that he 'appeared to be frightened, or that in their opinion he was frightened, or (to omit superfluous words, and speak in that positive manner in which witnesses would generally testify on such a subject) that he *was* frightened.' P. 493.

"A non-expert may testify that he thought a horse 'was not then sound: . . . his feet appeared to have a disease of long standing;' *Willis v. Quimby*, 31 N. H. 485, 487; that a horse 'appeared to be well, and free from disease;' that he thought 'he never saw any indication of the horse being diseased.' *Spear v. Richardson*, 34 N. H. 428-431. These two cases relate to the physical condition of a horse. The same doctrine is equally well settled in relation to the mental and moral condition of a horse, so to speak; for, in *State v. Avery*, 44 N. H. 392, 393, it was held, — *Bellows, J.*, — that a non-expert might testify, on an indictment for cruelly beating a horse, that the horse drove like a pleasant and well-disposed horse, unless when harassed by the whip; that, at the time of the beating, he saw no viciousness or obstinacy in the horse, and that the blows appeared to affect the horse in a particular man-

ner. The evidence was opinion, and nothing else; and it was opinion of the mental and moral condition of the horse, judged of by the witness from actions which it was impossible for the witness to describe in any better or more satisfactory way, so as to give the jury the best evidence the nature of the subject permitted.

"In *Whittier v. Franklin*, 46 N. H. 23, an action for a defective highway, — one point of the defence being that the plaintiff's horse, which he was driving at the time of the accident, was vicious and unsafe, and that the plaintiff's injuries were caused by the vices of his horse, — it was held, — *Bellows, J.*, delivering the opinion of the court, — that a non-expert who witnessed the accident might testify that 'he did not see any appearance of fright; that the horse did not appear to be frightened in the least before he went off the bank, or afterwards; that he appeared to be rather a sulky dispositioned horse to use.' Judge *Bellows* cites *People v. Eastwood*, 14 N. Y. 562, where it was held that opinions as to whether a person is intoxicated may be received; *Milton v. Rowland*, 11 Ala. 732; opinions as to the existence of disease, when perceptible to the senses; *Bennett v. Fail*, 26 Ala. 605; opinion that a slave appeared to be healthy; and other cases in relation to opinions of a healthy or sickly condition of body. He also cites *Spear v. Richardson*, and *Willis v. Quimby*, before referred to, as to opinion of health of horses. The very learned judge says that the substance of the statement of the witness is, that the horse did not appear to be frightened, but appeared to be sulky; that, on such subjects, persons of common observations may and do

distance of time; and a profession so to do, unless accurate notes at the time were taken, repels rather than attracts credence.¹ It has consequently been held sufficient, when the spoken words of another are to be testified to, to give their substance; the witness swearing to the material accuracy and completeness of the substance.²

A witness, however, cannot be permitted to say what is the impression left on him by a conversation, unless he swears to such impressions as recollections and not inferences.³ What a witness did in consequence of a conversation, however, he may be allowed to prove.⁴

§ 515. What has been said of words applies to all facts. I cannot remember exactly an entire conversation, nor can I reproduce exactly a chain of occurrences in their order. The limitedness both of human vision and of human expression forbids this; it is enough if a witness swears to events and objects according to the best of his recollection and belief.⁵ But it is no objection to the admissibility of

form opinions that are reasonably reliable in courts of justice, from marks and peculiarities that could not in words be conveyed to the minds of jurors, to enable them to make the just inferences; that it is much like the testimony that a horse appeared well and free from disease, or that a person appeared to be healthy, or intoxicated. P. 26. The evidence was held admissible as an *opinion*."

¹ See supra, §§ 411, 413.

² U. S. v. White, 5 Cranch C. C. 457; U. S. v. Maccomb, 5 McLean, 286; Lime Bank v. Fowler, 52 Me. 531; Pope v. Machias Co. 52 Me. 535; Eaton v. Rice, 8 N. H. 378; Maxwell v. Warner, 11 N. H. 568; Young v. Dearborn, 22 N. H. 372; Williams v. Willard, 23 Vt. 369; Clark v. Houghton, 12 Gray, 38; Woods v. Keyes, 14 Allen, 238; Kittredge v. Russell, 114 Mass. 67; Seymour v. Harvey, 11 Conn. 275; Huff v. Bennett, 6 N. Y. 337; Chaffee v. Cox, 1 Hilt. 78; Sloan v. Summers, 20 N. J. L. 6; Rhine v.

Robinson, 27 Penn. St. 30; Brown v. Com. 73 Penn. St. 321; Summons v. State, 5 Oh. St. 325; Horne v. Williams, 23 Ind. 37; Mineral Point R. R. v. Keep, 22 Ill. 9; Benson v. Huntington, 21 Mich. 415; Moody v. Davis, 10 Ga. 403; Riggins v. Brown, 12 Ga. 271; Rome R. R. v. Sullivan, 14 Ga. 277; Trammell v. Hemphill, 27 Ga. 528; Gildersleeve v. Caraway, 10 Ala. 260; Buchanan v. Atchison, 39 Mo. 503; Thurmond v. Trammell, 28 Tex. 371. See Magee v. Doe, 22 Ala. 609. Supra, § 180.

³ Morris v. Stokes, 21 Ga. 552; Lockett v. Mims, 27 Ga. 207; Bell v. Troy, 35 Ala. 184; Crews v. Threadgill, 35 Ala. 334; Helm v. Cantrell, 59 Ill. 528; Yost v. Devault, 9 Iowa, 60.

⁴ Whaley v. State, 11 Ga. 123.

⁵ Wilson v. McLean, 1 Cranch C. C. 465; Clark v. Bigelow, 16 Me. 246; Lewis v. Freeman, 17 Me. 260; Humphreys v. Parker, 52 Me. 505; Hibbard v. Russell, 16 N. H. 410; Tibbetts v. Flanders, 18 N. H. 284;

such evidence that the witness uses the term "impression," if he testifies to what he believes, however distrustful he may be as to perfect accuracy.¹ It is for the jury to determine how far such "impressions" are reliable.² So a witness is allowed to state why certain facts are impressed on his memory, if such reasons are not for other grounds inadmissible.³ Impressions, however, which are conjectural and uncertain, cannot be detailed.⁴

IX. REFRESHING MEMORY OF WITNESS.

§ 516. A witness who makes or is concerned in making written notes of an event near the time of its occurrence, is permitted to refer when under examination to such notes, in order to refresh his memory.⁵ So a witness, to refresh his memory, may refer to freight books kept by

Witness
may re-
fresh his
memory
by memo-
randa.

Hoitt v. Moulton, 21 N. H. 586; *State v. Flanders*, 38 N. H. 324; *Morse v. Crawford*, 17 Vt. 499; *Cavendish v. Troy*, 41 Vt. 99; *Dodge v. Bache*, 57 Penn. St. 421; *Burt v. Gwinn*, 4 Har. & J. 507; *Rhode v. Louthain*, 8 Blackf. 413; *Wiggins v. Holley*, 11 Ind. 2; *Lowry v. Harris*, 12 Minn. 255; *Franklin v. Macon*, 12 Ga. 257; *Rome R. R. v. Sullivan*, 14 Ga. 277; *Printup v. Mitchell*, 17 Ga. 558; *Huguley v. Holstein*, 35 Ga. 271; *Head v. Shaver*, 9 Ala. 791; *Griffin v. Isbell*, 17 Ala. 184; *Campbell v. State*, 23 Ala. 44; *Wells v. Shipp*, 1 Miss. (Walk.) 353; *Patrick v. Adams*, 19 Mo. 73; *Wetherell v. Patterson*, 31 Mo. 458; *Cornet v. Bertelsmann*, 61 Mo. 118; *Thompson v. Blackwell*, 17 B. Monr. 600; *Jones v. Childs*, 2 Dana, 25; *Sweeney v. Booth*, 28 Tex. 113; *Chaires v. Brady*, 10 Fla. 133. *Supra*, § 413.

What a witness did in consequence of certain conditions is generally admissible when proof of the conditions could be received.

¹ *Ibid*.

² *Duvall v. Darby*, 38 Penn. St. 56; *Crowell v. Bank*, 3 Oh. St. 406; *McRae v. Morrison*, 13 Ired. L. 46; *Beverly v. Williams*, 4 Dev. & B. L. 236.

³ *Thomas v. State*, 24 Ga. 287; *Bell v. Troy*, 35 Ala. 184.

⁴ *Clark v. Bigelow*, 16 Me. 246; *Lewis v. Brown*, 41 Me. 448; *Humphreys v. Parker*, 52 Me. 502; *Tebbetts v. Flanders*, 18 N. H. 284; *Wheeler v. Blandin*, 24 N. H. 168; *State v. Flanders*, 38 N. H. 324; *Ives v. Hamlin*, 5 Cush. 534; *Wiggins v. Holly*, 11 Ind. 2; *Wells v. Shipp*, 1 Miss. (Walk.) 383.

⁵ *Stephen's Ev.* 128; *Ins. Co. v. Weides*, 14 Wall. 375; *Brooks v. Goss*, 61 Me. 307; *Pinney v. Andrus*, 41 Vt. 631; *Chapin v. Lapham*, 20 Pick. 467; *Babb v. Clemson*, 12 Serg. & R. 328; *Smith v. Lane*, 12 S. & R. 84; *Sellower v. Rexford*, 52 Penn. St. 308; *Waters v. Waters*, 35 Md. 531; *Seaverns v. Tribby*, 48 Ill. 195; *White v. Tucker*, 9 Iowa, 100; *Moore v. Moore*, 39 Iowa, 461; *Watkins v. Wallace*, 19 Mich. 57; *Raynor v. Norton*, 31 Mich. 210; *Cowles v. Hayes*, 71 N. C. 230; *Columbia v. Harrison*, 2 Tread. (S. C.) 213; *Bull v. Lamson*, 5 S. C. 284; *Godden v. Pierson*, 42 Ala. 370; *Davidson v. De Lallande*, 12 La. An. 826; *Chiappella v. Brown*, 14 La. An. 189; *People v. Cotta*, 49 Cal. 167.

"Memoranda of facts, or circum-

him or verified by him at the making ;¹ and to "check-slips," made in the ordinary course of business, in transshipping goods from one car to another, in proof of the number of the cars, and of the distinctive marks of the goods.² So a surveyor may refresh his memory by an extract from his field notes,³ even though the copy he uses is in the shape of a printed report made by him, he being able to verify its correctness.⁴ In case the witness swears to the accuracy of the memoranda, or other refreshing¹ documents, they may go to the jury as evidence, if not *per se* inadmissible.⁵

stances, made by a witness at the time of the occurrence of a given transaction, are sometimes permitted to be given in evidence to show the existence of such facts or circumstances. Thus in *Marely v. Schults*, 29 N. Y. 346, the offer was to read a memorandum of the width of the flush boards on a certain dam, which was a specific fact, material to the issue. In *Guy v. Mead*, 22 N. Y. 462, the offer was to show that, at a given time, a certain indorsement of forty dollars was not on a note, that being a material fact for the consideration of the jury. In *Barker v. N. Y. C. R. R. Co.* 24 N. Y. 599, a conductor was allowed to read an entry, made by him, of the arrival of a train in Syracuse, at a time named." *Hunt, C. Reed v. Express Co.* 48 N. Y. 468.

¹ *Briggs v. Lafferty*, 14 Gray, 525.

² *Shriedley v. State*, 23 Oh. St. 130.

³ *Harrison v. Middleton*, 11 Grat. 527.

⁴ *Horn v. Mackenzie*, 6 Cl. & F. 619. *Infra*, § 522.

⁵ See *infra*, §§ 519, 520, 521, and cases cited *infra*, § 525, and cited in prior notes to this section. By the New York Civ. Code, § 1843, "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in

his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such writing, though he retain no recollection of the particular facts; but such evidence must be received with caution."

"Notes or memoranda made up by the witness at the moment, or recently after the fact, may be looked to in order to refresh his memory; but if they were made up at the distance of weeks or months thereafter, and still more, if done at the recommendation of one of the parties, they are not admissible. It is accordingly usual to allow a witness to look to memoranda made at the time, of dates, distances, appearances on dead bodies, lists of stolen goods, or the like, before emitting his testimony, or even to read such notes to the jury as his evidence, he having first sworn that they were made at the time, and faithfully done. In regard to lists of stolen goods, in particular, it is now the usual practice to have inventories of them made up at the time from the information of the witness in precognition, signed by him, and libelled on as a production at the trial, and he is then desired to read them, or they are read

§ 517. But a memorandum is inadmissible when it is secondary, *e. g.* where it is a copy of another not satisfactorily accounted for,¹ or where the witness could swear to the fact independently of the memorandum.² As we will hereafter see, the opposing party may put a memorandum so used in evidence after verifying it on cross-examination.³

Not admissible when memorandum is unnecessary.

to him, and he swears that they contain a correct list of the stolen articles. In this way much time is saved at the trial, and much more correctness and accuracy is obtained than could possibly have been expected, if the witness were required to state from memory all the particulars of the stolen articles, at the distance, perhaps, of months from the time when they were lost.

“With the exception, however, of such notes, memoranda, or inventories, made up at the time or shortly after the occasion libelled, a witness is not permitted to refer to a written paper as containing his deposition; for that would annihilate the whole advantage of *parol* evidence and *virâ voce* examination, and convert a jury trial into a mere consideration of written instruments. There is one exception, however, properly introduced into this rule; in the case of medical or other scientific reports, or certificates, which are lodged in process before the trial, and libelled on as productions in the indictment, and which the witness is allowed to read as his deposition to the jury, confirming it at its close by a declaration on his oath, that it is a true report. The reason of this exception is founded on the consideration, that the medical or other scientific facts or appearances, which are the subject of such a report, are generally so minute and detailed that they cannot with safety be intrusted to the memory of the witness, but much more reliance may be placed on a report made by him at

the time when the facts or appearances are fresh in his recollection; while, on the other hand, such witnesses have generally no personal interest in the matter, and from their situation and rank in life, are much less liable to suspicion than those of an inferior class, or more intimately connected with the transaction in question. Although, therefore, the scientific witness is always called on to read his report, as affording the best evidence of the appearances he was called on to examine, yet he may be, and generally is, subjected to a further examination by the prosecutor or a cross-examination on the prisoner's part; and if he is called on to state any facts in the case, unconnected with his scientific report, as conversations with the deceased, confessions heard by him from the panel, or the like, *utitur jure communi*, he stands in the situation of an ordinary witness, and must give his evidence verbally, in answer to the questions put to him, and can only refer to jottings, or memoranda of dates, &c., made up at the time to refresh his memory, like any other person put into the box.” Alison's Crim. Law, pp. 540-2.

¹ McCormick v. Mulvihill, 1 Hilt. 131; Neil v. Childs, 10 Ired. L. 195; Schettler v. Jones, 20 Wise. 412.

² Wolfborough v. Alton, 18 N. H. 195; Kelsea v. Fletcher, 48 N. H. 282; Meacham v. Pell, 51 Barb. 65; Driggs v. Smith, 45 How. (N. Y.) Pr. 417; Young v. Catlett, 6 Duer, 437; Haack v. Fearing, 5 Robt. (N. Y.) 528.

³ *Infra*, § 526.

§ 518. The fact that the witness has no recollection independent of the notes, does not exclude his testimony as to the facts stated in the notes, when he states that it was his uniform and unvarying practice to make true notes of events of the character noted, immediately after the occurrence of the events, and that the memoranda are parts of the notes in question. Nor will his testimony, as so made up, be excluded, if, after recurring to and identifying the notes, as substantially original and contemporaneous, he is able to swear by their means to the facts to which they relate.¹ So a notary's belief that protest and notice were given, based on his entry in his books, his habit being to make such entry on the happening of the event, will be evidence, though he has no recollection of the protest and notice, independent of his books.² The same rule applies to a surveyor's field notes used to refresh the memory of the surveyor.³ So a witness's testimony to the execution of a deed is admissible, though he recollects nothing of the facts, and only knows that his attestation must have been

¹ *R. v. St. Martins*, 12 A. & E. 210; *Maugham v. Hubbard*, 8 B. & C. 14; *Bradley v. Davis*, 26 Me. 349; *Haven v. Wendell*, 11 N. H. 112; *Wallace v. Goodhall*, 18 N. H. 439; *Huckins v. People's Co.* 31 N. H. 238; *State v. Shinborn*, 46 N. H. 497; *Mattocks v. Lyman*, 16 Vt. 113; *Norton v. Downer*, 33 Vt. 26; *Kent v. Garvin*, 1 Gray, 148; *Bradford v. Stevens*, 10 Gray, 378; *Dugan v. Mahoney*, 11 Allen, 572; *Adams v. Coulliard*, 102 Mass. 167; *Field v. Thompson*, 119 Mass. 152; *Lawrence v. Baker*, 5 Wend. 301; *Clark v. Vorce*, 15 Wend. 195; *Bank v. Culver*, 2 Hill (N. Y.), 531; *Moore v. Meaghan*, 10 N. Y. 207; *Halsey v. Sinsebaugh*, 15 N. Y. 485; *Marely v. Schultz*, 29 N. Y. 346; *Lefevre v. Lefevre*, 30 N. Y. 27; *Kennedy v. Crandell*, 3 Lansing, 1; *Taylor v. Stringer*, 1 Hilt. 377; *Farmers' Bk. v. Boraef*, 1 Rawle, 152; *Urket v. Coryell*, 5 Watts & S. 60; *Eby v. Eby*, 5 Penn. St. 435; *Gilmore*

v. Wilson, 53 Penn. St. 194; *Fitzgibbon v. Kinney*, 3 Harr. (Del.) 317; *McDaniel v. Webster*, 4 Houst. 305; *Martin v. Good*, 14 Md. 498; *Conner v. Mt. Vernon Co.* 25 Md. 55; *Spiker v. Nydegger*, 30 Md. 315; *Moots v. State*, 21 Oh. St. 653; *Harrison v. Middleton*, 11 Grat. 527; *Humphreys v. Spear*, 15 Ill. 275; *Wolcott v. Heath*, 78 Ill. 433; *Davenport v. Cumming*, 11 Iowa. 219; *Stickney v. Bronson*, 5 Minn. 215; *Chute v. State*, 19 Minn. 271; *Riggs v. Weise*, 24 Wis. 543; *Carr v. Stanley*, 7 Jones (N. C.) L. 131; *State v. Rawle*, 2 Nott & McC. 331; *O'Neil v. Walton*, 1 Rich. (S. C.) 234; *Vastbinder v. Metcalf*, 3 Ala. 100; *Cowles v. State*, 50 Ala. 454; *Tandy v. Masterson*, 1 Bibb, 330; *People v. Elyea*, 14 Cal. 144. See fully *infra*, § 680.

² *Bank of Tennessee v. Cowan*, 7 Humph. 70.

³ *Harrison v. Middleton*, 11 Grat. 527; *Nolin v. Parmer*, 21 Ala. 66.

contemporaneous and correct.¹ In such cases it is of course necessary that the notes relied on should be produced in court.²

§ 519. Nor to enable a witness so to refresh his memory, is it necessary that the memorandum thus used should be capable of being admitted independently in evidence.³ Short-hand notes, in themselves not admissible, from their imperfectness (if for no other reasons), may be reverted to by the witness, if made by him at the time;⁴ and so of an instrument without a stamp;⁵ and so of pencil notes.⁶ So it has been held, in the supreme court of the United States, that in a suit against an insurance company for the value of goods lost in the burning of a store, day-books and ledgers, whose correctness as showing the amount and value of the goods is testified to by the person proving them, are, in connection with his testimony, competent evidence, though they would not be so by themselves, to show such value.⁷

Not necessary that notes should be independently admissible.

¹ *Maugham v. Hubbard*, 8 B. & C. 16. See *infra*, § 739.

² *Hall v. Ray*, 18 N. H. 126.

It has, however, been held in New Hampshire, that whether a memorandum, which a witness knew when it was made to be correct, can go to the jury as evidence, depends upon whether the witness, after examining it, is able to state the fact from memory. *Watts v. Sawyer*, 55 N. H. 39.

"It is clear that the invoice taken by the plaintiff, with the assistance of Hartwell and Kame, in the manner stated in the case, was not admissible to show the cost of the goods. If admissible at all, for any purpose, I think it must be as a memorandum made by the witness, which he knew, at the time it was made, to be correct, and then only in case his memory was not refreshed by an examination of it, so that he could then state, from recollection, such matters contained in it as might be material. *Kelsea v. Fletcher*, 48 N. H. 282. I do not see why evidence, to show of what articles the stock was made up, as well as the

price each article brought at the sale, on the basis of 62½ per cent. of the prices set down in the paper, was not admissible as a memorandum, according to the well settled and well understood rules of practice in this state on that subject." *Ladd, J., Watts v. Sawyer*, 55 N. H. 40.

³ *Ins. Co. v. Weide*, 14 Wall. 375; *Dugan v. Mahoney*, 11 Allen, 572; *Sizer v. Burt*, 4 Denio, 426; *Neil v. Childs*, 10 Fred. (L.) 195; *Mayson v. Beasley*, 27 Miss. 106. See *Peck v. Lane*, 3 Lansing, 136; *Reed v. Jones*, 15 Wise. 40; *Schettler v. Jones*, 20 Wise. 412.

⁴ *R. v. O'Connell*, Arm. & T. 165.

⁵ *Alcock v. Ins. Co.* 13 Q. B. 292.

⁶ *Stetson v. Godfrey*, 20 N. H. 227.

⁷ "As to the second question, the admissibility of the evidence received by the court, there can be no doubt but the day-books and ledger, the entries in which were testified to be correct by the persons who made them, were properly admitted. They would not have been evidence, *per se*, but with the testimony accompanying them, all

§ 520. It is scarcely necessary to add, the mere fact of a witness being permitted to refer to a paper to refresh his memory does not authorize the putting such paper in evidence by the party calling the witness. Such paper (*e. g.* a letter containing other matters) may embrace

Memoranda
admissible
when pri-
mary and
relevant.

objections were removed. *Wood v. Ambler*, 4 Selden, 170. So in respect to the memorandum on the fly-leaf of the ledger. It was made by one of the witnesses, taken from inventories, present at the time it was made, but which had been subsequently destroyed by the fire. Those inventories, if they had been in existence, would have been the best evidence, and, unless their loss was accounted for, must have been produced. But, being lost, parol evidence of their contents was admissible, as secondary evidence, and so was the memorandum taken from them, for the like reason. As we understand the evidence in the case, the correctness of the entry was testified to. The witness was cross-examined, among other things, as to the correctness of it. The testimony is not given, but, if the evidence of the witness had not been satisfactory, it should have been placed upon the record." *Nelson, J., Ins. Co. v. Weide*, 6 Wall. 680.

The following opinions will be useful in this connection:—

"It is contended, in the first place, that there was error in the court's receiving the entry of the footings upon the fly-leaf of the new ledger. It will be observed that the footings upon the fly-leaf of the ledger were not offered or received as independent evidence. They were accompanied by proof that they were correct statements of the values of the merchandise, and that they were correctly transcribed either from the inventory book or from the fly-leaf of the exhausted ledger, both of which appear to have been originals. How far pa-

pers, not evidence *per se*, but proved to have been true statements of fact, at the time they were made, are admissible in connection with the testimony of a witness who made them, has been a frequent subject of inquiry, and it has many times been decided that they are to be received. And why should they not be? Quantities and values are retained in the memory with great difficulty. If at the time when an entry of aggregate quantities and values was made, the witness knew it was correct, it is hard to see why it is not at least as reliable as is the memory of the witness. It is true a copy of a copy is not generally receivable, for the reason that it is not the best evidence. A copy of the original is less likely to contain mistakes, for there is more or less danger of variance with every new transcription. For that reason even a sworn copy of a copy is not admissible when the original can be produced. But in this case the inventory book and the fly-leaf of the exhausted ledger had both been burned. There was no better evidence in existence than the footings in the new ledger. And we do not understand the bill of exceptions as showing those footings to have been copied from a copy. It does not appear whether they were taken from the inventory book or from the fly-leaf of the old ledger. And it is of little importance, for as those entries were made at the same time, neither ought to be regarded as a copy of the other, but rather both should be considered originals. We do not, however, propose to discuss this exception

topics inadmissible as irrelevant or self-serving.¹ It is otherwise, however, when the memorandum simply records the event which the witness details; in which case the memorandum is in itself evidence for the jury.² On the other hand, unless book entries

at length, for we regard it as settled by the decision in *Insurance Company v. Weide*, 9 Wallace, 677, that the evidence under the circumstances was properly received." Strong, J., *Insurance Companies v. Weide*, 14 Wallace, 380.

"The rule, with some exceptions, not including the present case, requires, for the admissibility of the entries, not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead, or insane, or beyond the reach of the process or commission of the court. The testimony of living witnesses personally cognizant of the facts of which they speak, given under the sanction of an oath in open court, where they may be subjected to cross-examination, affords the greatest security for truth. Their declarations, verbal or written, must, however, sometimes be admitted when they themselves cannot be called, in order to prevent a failure of justice. The admissibility of the declarations is in such cases limited by the necessity upon which it is founded.

"We do not deem it important to cite at length authorities for the rule and its limitation as we state it. They will be found in the approved treatises on evidence, and in the numerous cases cited by counsel on the argument. In this court the case of *Nicholls v. Webb*, reported in 8 Wheaton, 326, and that of *Insurance Company v. Weide*, reported in 9

Wallace, 677, are illustrations of the rule. In the first case, it was held that after the death of a notary, his record of protests was admissible upon proof of his death and handwriting; the court observing that it was the best evidence the nature of the case admitted of, that the party being dead his personal examination could not of course be had, and that the question was, whether there should be a total failure of justice or secondary evidence should be admitted to prove the facts. In the second case, the books and ledger of the plaintiffs were admitted in evidence to show the amount and value of goods lost by the burning of their store, upon the testimony of the parties who made the entries that they were correct, the court holding that the books "would not have been evidence *per se*, but with the testimony accompanying them, all objections were removed;" and referring to cases decided in the supreme court and court of appeals of New York, in support of the ruling. In both of these cases the entries were made by parties personally cognizant of the facts. This knowledge of the party making the entry is essential to its admissibility. His testimony, if living, would be rejected if ignorant of the facts entered, and it would be strange if his death could improve its value in that respect." Field, J., *Chaffee v. U. S.* 18 Wall. 541.

¹ *Olds v. Powell*, 10 Ala. 393; *Rutherford v. Bank*, 14 Ala. 92. See *Com. v. Fox*, 7 Gray, 585.

² See cases in prior sections; and §§ 525-6; *R. v. St. Martins*, 2 Ad. & El. 215; *Watson v. Walker*, 23 N. H.

offered to refresh memory are admissible independently, it is error to submit them to the jury.¹

§ 521. Notes or memoranda to which the memory of the witness does not immediately attach, cannot be used to refresh his memory. He must be able to say, "This was the paper made, or at the time verified, by me, as a true record of the events." An unverified copy of his notes made by some one else is not ordinarily admissible.² Thus to prove sales, the clerk who keeps the book of original entries should be called.³ Even where a person made entries in an

471; *Tuttle v. Robinson*, 33 N. H. 104; *Clark v. Vorce*, 15 Wend. 193; *Guy v. Mead*, 22 N. Y. 462; *Marcly v. Schultz*, 29 N. Y. 346; *Reed v. Expr. Co.* 48 N. Y. 468; *Farmers' Bk. v. Boraef*, 1 Rawle, 152; *Mims v. Sturdevant*, 36 Ala. 636.

¹ "The bill of exceptions shows that the delivery of the articles in question was not disputed, and that the only real issue in the case was upon whose order and credit they were delivered. The entries in the plaintiff's book of account were not admissible on that issue; they were not in the nature of a certificate required by law or usage, but were private memoranda; and the first ruling, excluding the book, was correct. *Somers v. Wright*, 114 Mass. 171. The entries may doubtless be shown to the witness to aid his recollection; and if they did not appear to have been admitted for any other purpose, the exception to their admission could not be sustained. *Dugan v. Mahoney*, 11 Allen, 572; *Cobb v. Boston*, 109 Mass. 438.

"But the final ruling of the learned judge, as stated in the bill of exceptions allowed by him, went beyond this. It was 'that the entry in the book might be regarded as a memorandum made by the plaintiff at the time, and, as such, entitled to some weight in confirmation of the recollection and evidence of the plaintiff'

upon the question at issue between the parties. This ruling was inconsistent with the first one, and allowed to these entries a weight as evidence, in corroboration of the plaintiff's testimony, to which they were not legally entitled. *Townsend Bank v. Whitney*, 3 Allen, 454; *Maine v. Harper*, 4 Allen, 115; *Bentley v. Ward*, 116 Mass. 333; *Prew v. Donahue*, 118 Mass. 438." *Field v. Thompson*, 119 Mass. 152, 153, Gray, C. J.

² *Burton v. Plummer*, 2 Ad. & El. 341; *Bradley v. Davis*, 26 Me. 45; *Stanwood v. McLellan*, 48 Me. 275; *State v. Shinborn*, 46 N. H. 497; *Kent v. Garvin*, 1 Gray, 148; *Davis v. Allen*, 9 Gray, 322; *Merrill v. R. R.* 16 Wend. 586; *Gould v. Conway*, 59 Barb. 355; *McCormick v. Mulvihill*, 1 Hilton (N. Y.), 131; *Moore v. Meacham*, 10 N. Y. 207; *Gilchrist v. Brooklyn*, 59 N. Y. 495; *Farmers' Bk. v. Boraef*, 1 Rawle, 152; *Fitler v. Eyre*, 14 Penn. St. 392; *Fitzgibbon v. Kinney*, 3 Harr. (Del.) 317; *McDaniel v. Webster*, 2 Houst. 305; *Green v. Caulk*, 16 Ind. 556; *Humphreys v. Spear*, 15 Ill. 275; *Chicago v. Adler*, 56 Ill. 344; *Davenport v. Cummings*, 15 Iowa, 219; *Paine v. Sherwood*, 19 Minn. 315; *Williams v. Kelsey*, 6 Ga. 365; *Evans v. Bolling*, 8 Porter, 546; *Crawford v. Bank*, 8 Ala. 79. See *infra*, §§ 682-3.

³ *Bradley v. Davis*, 26 Me. 49;

account book as such entries were read to him by another, from memoranda kept by the latter, within whose knowledge alone is the correctness of the charges, the entries are inadmissible.¹ So a paper not written but merely signed by a witness, who has no recollection whatever of its contents, is not evidence, though he swears that he has no doubt of the facts the paper states.²

§ 522. Where the entries were made by a clerk, under the witness's directions and in his presence, the witness may use them to refresh his memory.³ And a witness may use a memorandum to refresh his memory, although it was not made by himself, if he saw the paper shortly after the event, and then verified the accuracy of the entries.⁴ It is enough if the notes have been made by those with whom the witness was at the time acting, provided he examined them shortly after they were made, and was then satisfied of their accuracy.⁵ On the same reasoning a witness may refresh his memory by his deposition taken in a former case.⁶ So the reading of a receipt to a third party who assents to it, authorizes the witness to refresh his memory by recurring to the receipt.⁷ A plan or survey of land may be used in the same way;⁸ and so may the printed copy of a report.⁹ So copies may be used to refresh the memory when the witness can swear that these copies correctly state contemporaneous events.¹⁰ Yet it is not proper that the copy should be appealed to, even for the purpose of refreshing the memory, while the original can be produced.¹¹ When lost, or non-producible, then the copy, if verified, is admissible, even though it be in print.¹² On the other hand, admis-

Not necessary that writing should be by witness.

Kent v. Garvin, 1 Gray, 148; *White v. Wilkinson*, 12 La. An. 359.

¹ *Thomas v. Price*, 30 Md. 483.

² *Parsons v. Ins. Co.* 16 Gray, 463.

³ *Doe v. Perkins*, 3 T. R. 749; *R. v. St. Martin's*, 2 Ad. & El. 215; *Stephen's Ev.* 128; 2 Phil. Ev. 480; *State v. Lull*, 37 Me. 246.

⁴ *Coffin v. Vincent*, 12 Cush. 98; *Hill v. State*, 17 Wise. 675.

⁵ *Anderson v. Whalley*, 3 C. & K. 54; *Burrough v. Martin*, 2 Camp. 112; *Berry v. Jourdan*, 11 Rich. (S. C.) 67.

⁶ See *infra*, § 524.

⁷ *Rambert v. Cohen*, 4 Esp. 213; *Bolton v. Tomlin*, 5 A. & E. 856.

⁸ *Cundiff v. Orms*, 7 Porter, 58.

⁹ *Horne v. Mackenzie*, 6 C. & Fin. 628.

¹⁰ See *R. v. Hedges*, 28 How. St. Tr. 1387; *Tanner v. Taylor*, cited in *Doe v. Perkins*, 3 T. R. 751; *Chicago R. R. v. Adler*, 56 Ill. 314; *Madigan v. De Graff*, 17 Minn. 52; *Hill v. State*, 17 Wise. 675.

¹¹ *Burton v. Plummer*, 2 A. & E. 344.

¹² *Topham v. Macgregor*, 1 C. & K. 320; *Horne v. Mackenzie*, 6 Cl. & F.

sion has been refused to a newspaper account of a transaction in litigation, the accounts having been prepared from reports received on the day and at the place of the accident; it appearing that the author, having been examined as a witness, testified he talked with the plaintiff and others about it, and supposed he learned the facts from them, but had no distinct recollection of what was said, and could not tell from whom, principally, he received his information.¹

628; *Filkins v. Baker*, 6 Lansing, 516.

¹ "The article did not purport to be, and was not, in truth, a statement of a conversation with, or declarations made by, the plaintiff, and was not a memorandum made by the witness, of a particular conversation at or near the time it was had, and which the witness could state under oath was a correct memorandum of such conversation. It was not, therefore, competent as evidence of a statement made by the plaintiff, material to the issue, or inconsistent with his testimony on the trial. The printed paper was not the original memorandum made by the witness; neither did he nor could he, testify that the article or the copy from which it was printed was a correct memorandum or reproduction of the statement of the plaintiff, and it is not within the principle of any of the cases relied upon by the defendant. In all the cases, the original memoranda have been produced, and the persons by whom they were made have vouched for their correctness. *Guy v. Mead*, 22 N. Y. 462; *Halsey v. Sinsebaugh*, 15 N. Y. 485; *Russell v. R. R.* 17 Ibid. 134. The article was but a summary of the facts collected by the writer from all sources, or rather of his understanding of the facts." *Allen, J., Downs v. R. R.* 47 N. Y. 87.

"A copy of an entry made by himself, or by any other person, may be

used by a witness to refresh recollection; *Marely v. Schultz*, 29 N. Y. 346; and the original memorandum may be read in evidence, if made at or near the time when a material fact to which it relates occurred, and the witness producing it can swear that it was made correctly, though he cannot then recollect the facts contained in it. *Halsey v. Sinsebaugh*, 15 N. Y. 485. But a copy of a memorandum cannot be read as evidence of the contents of it. 29 N. Y., *supra*. Though the testimony as given in the appeal book is confused as to the various memoranda produced on the trial, it is evident that the memoranda first made by the plaintiff and those helping him were destroyed, and that the papers exhibited to the witnesses were prepared from them; but it does not appear that they were literally copies. It seems that in preparing the list of articles in the different lost trunks the memories of those engaged, principally that of the wife of the plaintiff, were set at work, and, as articles were brought to recollection from the bills of the purchase of them, and otherwise, they were set down upon paper; different pieces of paper it would appear. When this process was completed, the contents of those papers were transcribed in gross. These were the completed and corrected memoranda, and substantially the original memoranda. It was as to these that the plaintiff's wife testified

§ 523. The fact that memoranda are not made contemporaneously with the event is fatal to their admissibility, unless made when the memory is fresh.¹ This is eminently the case when the concoction is in view of litigation.² Thus where a witness who had noted down the transactions at their occurrence asked the solicitor of the party calling her to put her notes into the form of minutes, which she afterwards revised and transcribed, Lord Hardwicke, on discovering that she had recourse to these minutes to refresh her memory, suppressed her deposition.³ So, where a witness had drawn up a paper for the party calling him, after the cause was set down for trial, though eighteen months before the trial was actually heard, the court would not allow him to refer to it.⁴ But if there is no suspicion of concoction, the fact that the document used to refresh memory was not prepared for some weeks after the event will not exclude such document, if the delay, under the circumstances of the case, was natural and proper.⁵

Memoranda inadmissible if subsequently concocted.

§ 524. Depositions, signed or otherwise attested by a witness, can be used for the same purpose.⁶ Indeed, it has even been ruled that witnesses, testifying as to a trial, can refresh their memories by the notes taken by counsel at the trial, provided that afterward they can speak from recollection, and not solely from the notes.⁷ Where depo-

Depositions may be used to refresh the memory.

that she knew all the articles named in them were in the trunks. We do not understand that the memoranda were read to the jury as evidence of themselves of what were the contents of the lost trunks, but only a statement on paper, in detail, of what this witness had testified were the articles contained in the trunks. In this view the memoranda were competent." Folger, J., *McCormick v. R. R.* 49 N. Y. 315.

Hunnewell, 6 Pick. 222; *Downs v. R. R.* 47 N. Y. 82; *Kendall v. Stone*, 2 Sandf. (N. Y.) 269; *Spring Ins. Co. v. Evans*, 15 Md. 54; *Prather v. Pritchard*, 26 Ind. 65.

² *Steinkeller v. Newton*, supra.

³ Anonymous, cited by Lord Kenyon in *Doe v. Perkins*, 3 T. R. 752.

⁴ *Steinkeller v. Newton*, 9 C. & P. 315, *Tindal, C. J.*

⁵ *Vaughan v. Martin*, 1 Esp. 410.

⁶ *Vaughan v. Martin*, 1 Esp. 410; *Wood v. Cooper*, 1 C. & K. 645; *State v. Lull*, 37 Me. 216; *George v. Joy*, 49 N. H. 544; *Iglehart v. Jerne-gan*, 46 Ill. 513; *Burney v. Ball*, 24 Ga. 505; *Cobb v. State*, 27 Ga. 618; *Atkins v. State*, 16 Ark. 568.

⁷ *Lawes v. Reed*, 2 Lew. C. C. 152;

sitions of witnesses before a coroner's jury are to be proved, the coroner's clerk, after testifying that he had taken down the testimony of each witness correctly, has been permitted to state the evidence from the depositions themselves, not being required to state the evidence from his memory as refreshed by the depositions.¹ But it has been held, that in a criminal trial the prosecution cannot ask one of its witnesses to recur in his own mind to his testimony before the grand jury and thus refresh his memory.²

§ 525. The opposing party is not entitled to inspect a paper put into the witness's hands to refresh his memory, but which fails to have that effect.³ But where the witness depends upon the writing for the revival of his recollections, the opposite party is entitled to see the paper, and to cross-examine on the same.⁴ The court, however, may limit this right of inspection to such portions of a paper as are relevant.⁵ But when the paper is thus recognized by the party as true, or when it is cross-examined upon by the other side, as to its meaning (its adoption as true by the witness not being disputed), then, unless for other reasons inadmissible,⁶ it may go to the jury.⁷

It is within the discretion of the court to determine whether a party may cross-examine the witness on the paper before it is used by the witness.⁸

§ 526. The opposing party may make the paper his own evidence by examining the witness as to the whole of it, provided nothing in the examination casts discredit on

R. v. Philpotts, 5 Cox C. C. 329; *Henry v. Lee*, 2 Chit. R. 124; *Stetson v. Godfrey*, 20 N. H. 227; *Beaubien v. Cicotte*, 12 Mich. 459. See *Harvey v. State*, 40 Ind. 516.

¹ *Stephens v. People*, 19 N. Y. 549.

² *Com. v. Phelps*, 11 Gray, 73. See *Burdick v. Hunt*, 43 Ind. 381. *Infra*, § 601.

³ *R. v. Duncombe*, 8 C. & P. 369; *Lord v. Colvin*, 5 De Gex, M. & G. 47.

⁴ *R. v. St. Martins*, 2 A. & E. 215; *Loyd v. Freshfield*, 2 C. & P. 232; *Russell v. Ryder*, 6 C. & P. 416; *Lord v. Colvin*, 2 Drew. 205; *Beech*

v. Jones, 5 C. B. 696; *Pembroke v. Allenstown*, 41 N. H. 365. See *Com. v. Lannan*, 13 Allen, 563; *Harrison v. Middleton*, 11 Grat. 527; *McKivitt v. Cone*, 30 Iowa, 455. See, however, *Trustees v. Bledsoe*, 5 Ind. 133; *State v. Check*, 13 Ired. L. 114; *Hamilton v. Rice*, 15 Tex. 382.

⁵ *Com. v. Haley*, 13 Allen, 587. See *Burton v. Plummer*, 2 Ad. & El. 341; *Sinclair v. Stevenson*, 1 C. & P. 582; 10 Moore, 216.

⁶ See *supra*, § 519.

⁷ See cases cited to §§ 516, 526.

⁸ *Com. v. Burke*, 114 Mass. 261.

it;¹ but it is otherwise where he simply cross-examines the witness as to the memorandum on which the witness relies.²

whole of the notes in evidence.

X. CROSS-EXAMINATION.

§ 527. Supposing a witness to be unwilling, or at least not a willing witness on behalf of the cross-examining party,³ the party cross-examining is entitled to put such leading questions as will draw out positive answers of yes or no, and also, subject to the exceptions hereafter stated, may show bias in the witness.⁴ The witness may be also required to give the details of any incidents referred to by him in his examination in chief.⁵

On cross-examination leading questions may be put.

§ 528. It has been already noticed that the examination of an unwilling witness can be made more or less persistent and exhaustive at the discretion of the court. The right to exercise this discretion is peculiarly important on cross-examinations. There are cases in which, even in jurisdictions in which a party is ordinarily precluded from cross-examining as to new matter, it is essential to justice that new matter should be introduced on cross-examination. There are other cases in which, when fraud or mistake are probable though not proved, it is proper to give counsel great latitude so that the fraud or mistake, if there be such, should be tracked. Much, also, depends upon the attitude of the witness; much on that of the cross-examining counsel. In view of these considerations, courts of review are unwilling, except in extreme cases, to reverse a ruling as to the limits in the concrete of a cross-examination.⁶

Closeness of cross-examination at discretion of court.

¹ *Gregory v. Taverner*, 6 C. & P. 281.

² *Ibid.*; *R. v. Ramsden*, 2 C. & P. 604.

³ See, as indicating restrictions where the witness is hostile to the party calling him, *Taylor's Ev.* § 1288; *Moody v. Rowell*, 17 Pick. 498.

⁴ *Parkin v. Moon*, 7 C. & P. 409; *Terry v. McNiel*, 58 Barb. 241; *Batdorff v. Bank*, 61 Penn. St. 179; *Brown v. State*, 18 Oh. St. 496; *Bru-*

magin v. Bradshaw, 39 Cal. 24; *Winter v. Burt*, 31 Ala. 33.

⁵ *Metzer v. State*, 30 Ind. 596; *Burghart v. Brown*, 51 Mo. 600.

⁶ *New Gloucester v. Bridgham*, 28 Me. 60; *Thompson v. Smiley*, 50 Me. 67; *State v. Kimball*, 50 Me. 409; *Bishop v. Wheeler*, 46 Vt. 409; *Steene v. Aylesworth*, 18 Conn. 214; *Moody v. Rowell*, 17 Pick. 490; *Rand v. Newton*, 6 Allen, 38; *Prescott v. Ward*, 10 Allen, 203; *Com. v. Quin*, 5 Gray,

§ 529. Although in England, counsel, in cross-examination, are permitted to ask questions bearing on the whole case, so as to bring out matters of independent defence,¹ in this country, in most jurisdictions, cross-examinations, with greater propriety, are confined to the subject of the examination in chief, and that of the credit of the witness. If a matter of defence is to be proved, this must be reserved until the cross-examining party has opened his case, when he is at liberty to call the witness to prove such defence.² In several states, however, this limitation of the range of cross-examination is not applied.³ In any view, the right of cross-examination extends to all matters connected with the *res gestae*.⁴

478; *Wallace v. R. R.* 119 Mass. 91; *Great West. Co. v. Loomis*, 32 N. Y. 127; *La Beau v. People*, 34 N. Y. 223; *Wells v. Kelsey*, 37 N. Y. 143; *West v. State*, 22 N. J. L. 212; *Clark v. Trinity Church*, 5 Watts & S. 266; *Elliott v. Boyles*, 31 Penn. St. 65; *Flagg v. Searle*, 1 Weekly Notes of Cases, 290; *Legg v. Drake*, 1 Oh. St. 286; *Young v. Bennett*, 4 Seam. 43; *Toledo R. R. v. Williams*, 77 Ill. 354; *Floyd v. Wallace*, 31 Ga. 688; *Winter v. Burt*, 31 Ala. 33; *Carmichael*, in re, 36 Ala. 514; *Missouri R. R. v. Haines*, 10 Kans. 439; *Dale v. Blackburn*, 11 Kans. 190; *Thornton v. Hook*, 36 Cal. 223. See *Am. Law Rev.* Jan. 1877, 396.

¹ *Murphy v. Brydges*, 2 Stark. R. 314.

² *Houghton v. Jones*, 1 Wall. 702; *Phil. & Trenton R. R. v. Stimpson*, 14 Pet. 448; *Seavy v. Dearborn*, 19 N. H. 351; *Donnelly v. State*, 26 N. J. L. 463, 601; *Ellmaker v. Buckley*, 16 S. & R. 77; *Farmers' Bk. v. Strohecker*, 9 Watts, 237; *Castor v. Bavington*, 2 Watts & S. 505; *Floyd v. Bovard*, 6 W. & S. 77; *Helser v. McGrath*, 52 Penn. St. 531; *People v. Horton*, 4 Mich. 67; *Campau v. Dewey*, 9 Mich. 381; *Patton v. Hamilton*, 12 Ind. 256; *Aurora v. Cobb*, 21 Ind. 492;

Chicago v. R. R. 36 Ill. 60; *Bell v. Prewitt*, 62 Ill. 362; *Drohn v. Brewer*, 77 Ill. 280; *Cokely v. State*, 4 Iowa, 477; *Wilhelmi v. Leonard*, 13 Iowa, 330; *Congar v. R.* 17 Wise. 477; *Beaulien v. Parsons*, 2 Minn. 37; *Sumner v. Blair*, 9 Kans. 521; *Ferguson v. Rutherford*, 7 Nev. 385; *Brown v. State*, 28 Ga. 199; though see *White v. Dinkins*, 19 Ga. 285; *McClelland v. West*, 70 Penn. St. 183; *Malone v. Dougherty*, 79 Penn. St. 48; *Aiken v. Mendenhall*, 25 Cal. 212; *People v. Miller*, 33 Cal. 99; *Austin v. State*, 14 Ark. 555.

³ *Moody v. Rowell*, 17 Pick. 490, 498; *Com. v. Morgan*, 107 Mass. 204; *Jackson v. Varick*, 7 Cow. 238; *Fulton Bank v. Stafford*, 2 Wend. 483; *Wroe v. State*, 20 Oh. St. 460; *Fralick v. Presley*, 29 Ala. 457; *Mask v. State*, 32 Miss. 405; *State v. Sayers*, 58 Mo. 585; *O'Donnell v. Segar*, 25 Mich. 367; *Haynes v. Ledyard*, 33 Mich. 319.

⁴ *Markley v. Swartzlander*, 8 Watts & S. 172; *Rhodes v. Com.* 48 Penn. St. 396. See, to the effect that the order of testimony is at the discretion of the court, *Seibert v. Allen*, 61 Mo. 482; *Rankin v. Rankin*, 61 Mo. 295; *Merrill v. Nightingale*, 39 Wise. 247.

§ 530. The conflict, however, which has just been stated, may be reduced by remembering that a witness, in testifying to the case of the party who calls him, impliedly warrants his own truthfulness of narration, and may, as we will presently see, be cross-examined not only as to whatever touches this truthfulness, but as to whatever goes to explain or modify what he has stated in his examination in chief.¹ But in any view, a witness may be cross-examined as to his examination in chief in all its bearings. Thus a subscribing witness to a will may be cross-examined as to the testator's sanity.² When a witness is recalled by B. to substantiate B.'s case, the witness having been originally called by A., A. on the second examination, is, from the nature of the case, entitled to cross-examine, though with a liberty as to leading questions to be determined by the circumstances of the case and the bias of the witness.³

¹ *Wilson v. Wagar*, 26 Mich. 452.

² *Egbert v. Egbert*, 78 Penn. St. 326. "All that occurred at the execution of the will," said Paxson, J., "including the physical and mental condition of the testator at the time, was proper for cross-examination. A testator may be so weak physically as to be unable to write his name; he may if necessary call upon some one to sign the will for him, or to hold his hand while he traces his signature; his mind may be so clouded by disease or approaching dissolution, or it may be so impaired by intemperance or other vices, as to be incapable of forming an intelligent or connected thought. It is clearly the right of parties contesting a will to inquire into such matters, upon the cross-examination of the subscribing witnesses. Nor is this a departure from the familiar rule of evidence, that a defendant who has not opened his case will not be allowed to introduce it to the jury by cross-examining the witnesses for the adverse party, for the reason, as before stated, that the mental condition of a testator at the time of the execution of his will is a part of the *res gestae*."

³ *Malone v. Spilessy* Ir. Cir. Ct. 504, cited *Taylor's Ev.* § 1290; *Lord v. Colvin*, 3 Drew. 222. See *infra*, § 549.

On the tone of cross-examination a standard authority thus speaks:—

"It is often a convenient way of examining to ask a witness whether such a thing was said or done, because the thing mentioned aids his recollection, and brings him to that stage of the proceedings on which it is desired that he should dilate. But this is not always fair; and when any subject is approached, on which his evidence is expected to be really important, the proper course is to ask him what was done, or what was said, or to tell his own story. In this way, also, if the witness is at all intelligent, a more consistent and intelligible statement will generally be got, than by putting separate questions; for the witnesses generally think over the subjects on which they are to be examined in criminal cases so often, or they have narrated them so frequently to others, that they go on much more fluently and distinctly, when allowed to follow the current of their own ideas, than when they are at every moment inter-

§ 531. As has already been seen, the present English practice is to permit counsel, on cross-examining a witness as to previous statements made by him in writing, to interrogate the witness as to such writing without previously exhibiting to him its contents.¹ At common law this right is not allowed.²

Witness's memory may be probed by written instrument.

rupted or diverted by the examining counsel. Where a witness is evidently prevaricating or concealing the truth, it is seldom by intimidation or sternness of manner that he can be brought, at least in this country, to let out the truth. Such measures may sometimes terrify a timid witness into a true confession; but in general they only confirm a hardened one in his falsehood, and give him time to consider how seeming contradictions may be reconciled. The most effectual method is to examine rapidly and minutely, as to a number of subordinate and apparently trivial points in his evidence, concerning which there is little likelihood of his being prepared with falsehood ready made; and where such a course of interrogation is skilfully laid, it is rarely that it fails in exposing perjury or contradiction, in some parts of the testimony, which it is desired to overturn. It frequently happens that, in the course of such a rapid examination, facts most material to the cause are elicited, which were either denied, or but partially admitted before. In such cases, there is no good ground, on which the facts thus reluctantly extorted, or which have escaped the witness in an unguarded moment, can be laid aside by the jury. Without doubt they come tainted from the polluted channel through which they are adduced; but still it is generally easy to distinguish what is true in such depositions from what is false, because the first is studiously withheld, and the second is as carefully put forth; and it frequently happens, that in this

way the most important testimony in a case is extracted from the most unwilling witness, which only comes with the more effect to an intelligent jury, because it has emerged by the force of examination in opposition to any obvious desire to conceal." Alison, Pract. of Cr. L. 546, 547. "The late Lord Abinger, whose powers as a cross-examining counsel were unrivalled, was fond of giving his juniors this advice: "Never drive out two tacks by trying to hammer in a nail."

Cross-examination as to bias is hereafter noticed, *infra*, § 545.

¹ See *supra*, § 68.

² See, fully, § 68. *Romertze v. Bank*, 49 N. Y. 577; *People v. Donovan*, 43 Cal. 162.

"In *Holland v. Reeves*, 7 C. & P. 39, a party put a document into the hands of an adverse witness, and cross-examined him upon it, whereupon he was required by the opposite counsel to have it read forthwith; but Alderson, B., held that the cross-examining party was not bound to put in the document until he had opened his own case. It would seem, however, in such a case, that the opposite counsel would have a right to inspect the document, in order to found questions upon it in re-examination." Taylor's Ev. § 1270, note.

In *Kitchen v. R. R.* 59 Mo. 514, it was said that counsel cannot read his former deposition to a witness, and then put the question, whether the statements contained therein are true, unless on a proper foundation laid for

§ 532. For the mere purpose of probing memory, however, a witness cannot be cross-examined as to collateral matters, unless the effect of the testimony, if rendered, would go to prove bias or falsity.¹

Collateral points not be introduced to test memory.

§ 533. A witness, such is one of the most cherished sanctions of Anglo-American law, will not be compelled to answer any question the answer to which would be a link in a chain of evidence by which he could be convicted of a criminal offence.² The same rule holds in equity.³ The privilege extends to inculpatory documents.⁴ Neither husband nor wife is compelled to answer questions involving the other's criminality.⁵ Refusal to answer, however, may be used as a presumption against a witness so refusing.⁶

Witness will not be compelled to criminate himself.

§ 534. So, also, a witness will be relieved from answering a

that purpose he designs to show some inconsistency in the deposition, or to impeach the credibility of the witness. Whether the deposition may be used to save time in asking questions, is a matter purely in the discretion of the court, which cannot be reviewed in the supreme court.

¹ *U. S. v. Hudland*, 5 Cranch C. C. 309; *Com. v. Shaw*, 4 Cush. 593; *Holbrook v. Dow*, 12 Gray, 357; *Lawrence v. Barker*, 5 Wend. 301; *Iron Mountain Bk. v. Murdock*, 62 Mo. 70; though see *Ross v. Hayne*, 3 Greene, 211. *Infra*, § 545.

² *R. v. Friend*, 13 How. St. Tr. 16; *R. v. Macclesfield*, 16 How. St. Tr. 1146; *Cates v. Hardacre*, 3 Taunt. 24; *R. v. Slaney*, 5 C. & P. 213; *Maloney v. Bartley*, 3 Camp. 210; *Chesler v. Wortley*, 7 C. B. 410; 1 *Burr's Trial*, 244; *Neale v. Cumingham*, 1 Cranch C. C. 76; *U. S. v. Moses*, 1 Cranch C. C. 170; *U. S. v. Strother*, 3 Cranch C. C. 432; *Low v. Mitchell*, 18 Me. 372; *State v. Blake*, 25 Me. 350; *State v. K.* 4 N. Hamp. 562; *Coburn v. Odell*, 30 N. H. 540; *Chamberlain v. Wilson*, 12 Vt. 491; *Brown v. Brown*, 5 Mass. 320; *Com. v. Kimball*, 24 Pick. 366. See *Phelin v.*

Kenderdine, 20 Penn. St. 351; *People v. Mather*, 4 Wend. 229; *People v. Rector*, 19 Wend. 569; *Southard v. Rexford*, 6 Cow. 254; *Tappan*, in re, 9 How. Pr. 391; *Byass v. Sullivan*, 21 How. Pr. 50; *Warner v. Lucas*, 10 Ohio, 336; *Howel v. Com.* 5 Grat. 664; *Poindexter v. Davis*, 6 Grat. 481; *Lister v. Boker*, 6 Blackf. 439; *Printz v. Cheney*, 11 Iowa, 469; *Hopkins v. Olin*, 23 Wise. 309; *Simmons v. Holster*, 13 Minn. 219; *Higdon v. Heard*, 14 Ga. 255; *Pleasant v. State*, 15 Ark. 621; *State v. Marshall*, 36 Mo. 400; *Lea v. Henderson*, 1 Coldw. 146. In New York, by the Revised Code, the protection is limited to cases of felony. Rev. Code, § 1854.

³ *Macnillum v. Turton*, 2 Y. & J. 183; *Claridge v. Hoare*, 11 Ves. 59; *Paxton v. Douglass*, 19 Ves. 225; *Hayes v. Caldwell*, 5 Gilman, 33.

⁴ See *infra*, § 751. *Byass v. Sullivan*, 21 How. N. Y. Pr. 50.

⁵ *Cartwright v. Green*, 8 Ves. 405; *R. v. All Saints*, 6 M. & Sel. 200. See *supra*, § 432.

⁶ *Andrews v. Frye*, 101 Mass. 234. *Infra*, § 546.

question a reply to which might expose him to a forfeiture of his estate.¹ Nor does it make a difference that the penalties, in a penal prosecution, are limited to a fine.² Thus a party will be protected from giving an answer which exposes him to a prosecution for usury.³

§ 535. A party cannot interpose the objection that the answer will expose the witness to punishment. The privilege must be claimed by the witness in order to be available.⁴ The judge is not bound to notify the witness of his privilege in this relation,⁵ though he may at his discretion give an intimation to this effect.⁶

¹ *Parkhurst v. Lowten*, 1 Mer. 401; *Uxbridge v. Staveland*, 1 Ves. Sr. 56.

² *Anderson v. State*, 7 Ohio (Part ii.), 250.

³ *Bank of Saline v. Henry*, 2 Denio, 155; *Curtis v. Knox*, 2 Denio, 341; *Henry v. Bank*, 3 Denio, 593. See *Mitford's Eq. Pl.* 157; *Parkhurst v. Lowten*, 1 Mer. 401; and see *infra*, § 537.

⁴ *R. v. Adey*, 1 M. & Rob. 94; *Thomas v. Newton*, M. & M. 48, n.; *Fisher v. Ronalds*, 12 C. B. 764; *Marston v. Downes*, 1 A. & E. 34; *State v. Foster*, 3 Foster (N. H.), 348; *Com. v. Shaw*, 4 Cush. 594; *Ward v. People*, 6 Hill (N. Y.), 144; *State v. Bilansky*, 3 Minn. 246; *State v. Patterson*, 2 Ired. L. 346; *Newcomb v. State*, 37 Miss. 383; *Sodusky v. McGee*, 5 J. J. Marsh. 621; *Clark v. Reese*, 35 Cal. 89.

"In *R. v. Garbett*, 1 Den. 236, it was held that a witness is not compellable to answer a question if the court be of opinion that the answer might tend to criminate him. It was also held in the same case that the court may compel a witness to answer any such question; but that if the answer be subsequently used against the witness in a criminal proceeding, and a conviction obtained, judgment will be respited, and the conviction reversed." See *infra*, § 539. In a later case, *Fisher*

v. Ronalds, 12 C. B. 762, Maule, J., and Jervis, C. J., held, that it is for the witness to exercise his own judgment, and to say whether the answer will criminate him, and that if he thinks that it will, he may refuse to answer. This view was doubted by Parke, B., in a later case, *Osborne v. London Dock Co.* 10 Ex. 698, where the learned judge indicated his adherence to the doctrine of *R. v. Garbett*. The court of queen's bench, however, has since held that a witness can only claim the right of refusing to answer a question when the court is satisfied that there is any real danger of a prosecution if he does answer. *R. v. Boyes*, 1 B. & S. 311." *Powell's Evidence* (4th ed.), 109.

"It is settled that it is no ground for a witness to refuse to go into the box, that the question will criminate him, and that he will refuse to answer it. The privilege can be claimed only by the witness himself after he has been sworn and the objectionable question put to him. *Boyle v. Wiseman*, 10 Ex. 647. And the witness must pledge his oath that he believes the answer will tend to criminate him." *Powell's Evidence* (4th ed.), 109.

⁵ *Atty. Gen. v. Radloff*, 10 Ex. R. 88.

⁶ *Fisher v. Ronalds*, 12 C. B. 764; *R. v. Boyes*, 2 Fost. & F. 158; *Foster v. Pierce*, 11 Cush. 437; *Com. v. Price*,

§ 536. It has been said that a witness cannot be compelled to give a link to a chain of evidence by which his conviction of a criminal offence can be insured; and this position is abundantly sustained by authority.¹ But

Danger of prosecution must be real.

10 Gray, 472; Mayo v. Mayo, 119 Mass. 292.

“It is within the discretion of the court, and the usual practice, to advise a witness that he is not bound to criminate himself where it appears necessary to protect the rights of the witness. If, after having advised him generally, it appears to the presiding justice that the witness intends to insist upon his privilege, but does not fully understand his rights, it is competent for him to instruct the witness fully as to them, otherwise the witness might be entrapped into a position where his privilege as a witness would be entirely defeated through his ignorance, and he would be obliged fully to criminate himself. Foster v. Pierce, 11 Cush. 437; Commonwealth v. Price, 10 Gray, 472. In the case at bar, therefore, it was competent for the presiding justice, after the witness had made some answers tending to criminate her, if he was satisfied that she had answered ignorantly, and in misapprehension of her rights and duty to the court, to instruct her more fully, and to advise her that she was not obliged to answer further. And it necessarily followed that such answers already given should be stricken out. The libellant would have no right to cross-examine the witness in regard to them, and the only way to preserve the rights of all parties was to strike them from the case, as inadvertently and improperly admitted.” Mayo v. Mayo, 119 Mass. 292, Morton, J.

¹ Cates v. Hardacre, 3 Taunt. 424; Macullum v. Turton, 2 Y. & J. 183; Harrison v. Southcote, 1 Atk. 518;

King v. King, 2 Roberts. 153; Parkhurst v. Lowten, 2 Swanst. 215; People v. Mather, 4 Wend. 229; Southard v. Rexford, 6 Cow. 254; Bank of Salina v. Henry, 2 Denio, 155; Whart. Cr. Law (7th ed.), 809; Lea v. Henderson, 1 Cold. (Tenn.) 146.

1 Burr’s Trial, 424. The question arose on Burr’s trial in the following shape: A paper being produced to the court in cipher, a witness (Mr. Willie) was asked, “Did you copy this paper?” He objected, that, if any paper he had written would have any effect on any other person, it would as much affect himself. Mr. Wirt insisted that, as the witness had sworn, in a previous deposition, that he did not understand the cipher, the mere *act of copying* could not implicate him. Willie was then asked, “Do you understand its contents?” It was admitted by the witness that the question *per se* might be innocent, but should he answer, the prosecution might go on gradually, until it at last obtained matter enough to criminate him. The counsel for the prosecution admitted, that, if they had followed with a question as to what were the contents of the letter, the objection might be valid. But they as yet had not. If he answered that he did understand the letter, his answer to the other question might amount to self-crimination; but if he did not understand it, it could not criminate him. The question was again changed, “Do you know this letter to be written by Aaron Burr, or any one under his authority?” Marshall, C. J., said that was a proper question. The witness still refused to answer, as it might crim-

it at the same time must appear, from the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. If the fact of the witness being in danger is once made evident, great latitude should be allowed to him in judging of the effect of any particular question. The danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law, in the ordinary course of things, and not a danger of an imaginary character, having reference to some barely possible contingency.¹ The witness may claim the protection of the court at any stage of the inquiry, unless he have already answered without objection questions bringing virtually out the alleged criminative facts.² Danger of prosecution in a foreign court may be considered as giving such privilege.³

Exposure to civil liability no excuse, nor to police misdemeanors. § 537. It need scarcely be added that a witness cannot excuse himself on the ground that his answer would expose him to civil liability.⁴ That a witness's statement when examined can be afterwards made the basis

inate him. The question was then argued, when the chief justice remarked, that the proposition contended for on the part of the witness, that he was to be the sole judge of the effect of his answer, was too broad; while that on the other side, that a witness can never refuse, unless the answer will *per se* convict him of a crime, was too narrow. He is not compellable to disclose a single link in the chain of proof against him. If the letter contained evidence of a treason, a question determinable on other testimony by his acquaintance with it when written, he might probably be guilty of misprision of treason; and the court ought not to compel his answer. If it relate to the misdemeanor (setting on foot an unlawful military expedition against Mexico), the court were not apprised that such knowledge would affect the witness. The conclusion was, that the question which respected the present

knowledge of the cipher, as it would not affect him in any view, must be answered.

¹ R. v. Boyes, 1 B. & S. 311; 9 Cox C. C. 32; 2 F. & F. 157; People v. Kelly, 27 N. Y. 74; Wroe v. State, 20 Ohio St. 460, and cases cited supra, § 535.

² *Infra*, § 539.

³ U. S. v. McRae, L. R. 3 Ch. App. 79, by Ld. Chelmsford; though see *King of Two Sicilies v. Willeox*, 1 Sim. N. S. 301.

⁴ *Lowney v. Perham*, 20 Me. 235; *Copp v. Upham*, 3 N. H. 159; *Stevens v. Whitcomb*, 16 Vt. 121; *Ball v. Loveland*, 10 Pick. 9; *Real v. People*, 42 N. Y. 270; *Baird v. Cochran*, 4 Serg. & R. 397; *Nass v. Van Swearingen*, 7 S. & R. 192; *Hays v. Richardson*, 1 Gill & J. 366; *Taney v. Kemp*, 4 Har. & Johns. 348; *Harper v. Burrow*, 6 Ired. 30; *Alexander v. Knox*, 7 Ala. 503; *Judge v. Green*, 1 How. (Miss.) 146; *Planters' Bk. v. George*, 6 Martin,

of a suit against him, we have already seen.¹ Papers and documents a witness, in like manner, is compellable to produce, however unfavorable the production may be to his pecuniary interests;² though in England an exception is made in favor of titles to estates, on account of the mischief which, in the English system, might be caused if the production of such papers were coerced.³ Formerly, also, parties were excepted from this rule; but now, by statute in most states, even parties may be compelled to produce papers which are not criminatory.⁴ What has been said as to civil suits has been extended, on ground of public policy, to prosecutions for such police offences as selling spirituous liquors without license. In such cases, the vendee of the illicit drink will be compelled to answer, though by so doing he expose himself to a prosecution as accessory to the sale.⁵

§ 538. The witness is not the sole judge of his liability. The liability must appear reasonable to the court, or the witness will be compelled to answer.⁶ Thus a witness will be compelled to answer as to conditions which he shares with many others (*e. g.* whether he was in the neighborhood of a homicide on a particular day, when such neighborhood includes a city), though not as to conditions which would bring the crime in suspicious nearness to himself.⁷ But in order to claim the protection of the court the witness is not required to disclose all the facts, as this would defeat the object for which

Court determines as to privilege.

670; *Conover v. Bell*, 6 T. B. Mon. 157; *Com. v. Thurston*, 7 J. J. Marsh. 63; *Zollickoffer v. Turney*, 6 Yerg. 297.

¹ *Supra*, § 488.

² *Doe v. Date*, 3 Q. B. 609; *Doe v. Egremont*, 2 M. & Rob. 386; *Davies v. Waters*, 9 M. & W. 608. *Infra*, §§ 742-56.

³ *Doe v. Date*, 3 Q. B. 369; *Pickering v. Noyes*, 1 B. & C. 263.

⁴ See *supra*, § 489; *infra*, §§ 745, 751.

⁵ *State v. Rand*, 51 N. H. 361; *Com. v. Willard*, 22 Pick. 476; *Com. v. Downing*, 4 Gray, 29; though see *Doran's case*, 2 Parsons R. 467.

⁶ *Osborn v. Dock Co.* 10 Exch. 698; *Sidebotham v. Adkins*, 27 L. J. Ch. 152; *R. v. Boyes*, 1 B. & S. 311; *Fer-*

andez, ex parte, 10 C. B. N. S. 3, 39; *Com. v. Brainerd*, Thacher C. C. 146; *Grannis v. Branden*, 5 Day, 260; *Jackson v. Humphrey*, 1 Johns. R. 498; *People v. Mather*, 4 Wend. 229; *Southard v. Rexford*, 6 Cow. 254; *Real v. People*, 42 N. Y. 270; *Galbreath v. Eichelberger*, 3 Yeates, 515; *Vaughan v. Perrine*, 2 Penn. 144; *Winder v. Diffenderffer*, 2 Bland, 166; *Ward v. State*, 2 Mo. 98; *Territory v. Nugent*, 1 Mart. 114; *Archbold's C. P.* (ed. of 1871), 277; *Richman v. State*, 2 Greene (Iowa), 532; *Kirshner v. State*, 9 Wisc. 140; *Floyd v. State*, 7 Tex. 215; and see cases cited *supra* to § 535.

⁷ *R. v. Boyes*, 1 B. & S. 311; 9 Cox C. C. 22; *Wroe v. State*, 20 Oh. St. 460. *Supra*, § 536.

he claims protection.¹ It is not, indeed, enough for the witness to say that the answer will criminate him.² It must appear to the court, from all the circumstances, that there is a real danger; though this the judge is allowed to gather from the whole case, as well as from his general perceptions of the relations of the witness.³

§ 539. In this country the tendency of authority is that a witness who voluntarily opens an account of a transaction exposing him to a criminal prosecution, is obliged to complete the narrative. He cannot, for instance, state a fact, and afterwards refuse to give the details.⁴ Even a party who becomes a witness cannot, after waiving his rights, decline a cross-examination, on the ground that it exposes a criminality which he has already discovered.⁵ In England, by a majority of the judges, it is now held that a witness may at any time avail himself of the protection of the court, and refuse further answers.⁶

§ 540. It is necessary, however, that the offence should be one to which some penal consequences are attached. If there be a pardon issued by the proper authorities, the witness will be compelled to answer;⁷ and so when the

¹ *R. v. Garbett*, 2 C. & K. 495; *Fisher v. Ronalds*, 12 C. B. 762; *Mexican & S. Amer. Co., ex parte*, 4 De Gex & J. 220; 27 Beav. 474.

² *R. v. Boyes*, 9 Cox, 32; 1 B. & S. 311; *Osborn v. Dock Co.* 10 Ex. R. 701; *Fernandez, ex parte*, 10 C. B. N. S. 3. See, however, *contra*, *Warner v. Lucas*, 10 Ohio, 336; *Poole v. Perritt*, 1 Speers, 128.

³ See *Vaillant v. Dodemead*, 2 Atk. 524; *R. v. Boyes*, 1 B. & S. 311.

⁴ *East v. Chapman*, 1 M. & Mal. 46; 4 C. & P. 570; *Low v. Mitchell*, 18 Me. 372; *State v. K.*, 4 N. H. 562; *State v. Foster*, 23 N. H. 348; *Chamberlain v. Wilson*, 12 Vt. 491; *Foster v. Pierce*, 11 Cush. 437; *Com. v. Price*, 10 Gray, 472; *People v. Carroll*, 3 Park. C. R. 73; *People v. Lohman*, 2 Barb. 216; *Alderman v. People*, 4 Mich. 414.

⁵ *State v. Ober*, 52 N. H. 459; *Com. v. Lannan*, 13 Allen, 563; *Com. v. Mullen*, 97 Mass. 545; *Com. v. Morgan*, 107 Mass. 199; *McGarry v. People*, 2 Lansing, 227; *Burdick v. People*, 58 Barb. 51; *Fralich v. People*, 65 Barb. 48; *Connors v. People*, 50 N. Y. 240; *Barber v. State*, 13 Fla. 675. *Supra*, § 483.

⁶ *R. v. Garbett*, 2 C. & K. 274; *S. C.* 1 Den. C. C. 235; 2 Cox C. C. 448; overruling *Dixon v. Vale*, 1 C. & P. 278; *East v. Chapman*, 2 C. & P. 573; *Ewing v. Osbaldiston*, 6 Sim. 808. As according with *R. v. Garbett*, may be cited *Cozzens, ex parte*, Buck. 531. See *supra*, 535.

⁷ *R. v. Boyes*, 2 F. & F. 157; *S. C.* 9 Cox C. C. 32; *R. v. Maloney*, 9 Cox C. C. 26; *R. v. Charlesworth*, 2 F. & F. 326.

statute of limitations has interposed a bar.¹ Statutes of indemnity and special amnesty have the same effect, when they do not conflict with local constitutions.² In New York, for instance, where the Constitution simply secures the witness from being a "witness against himself," indemnity statutes have been held to preclude the witness from setting up privilege;³ and so, also, has it been ruled under a similar provision in the Constitution of the United States.⁴ In Massachusetts, however, where the Constitution provides that no person "shall be compelled to accuse or furnish evidence against" himself, a statute which is not coextensive with the constitutional provision does not divest the witness of his common law rights.⁵

§ 541. Every man is entitled to such a measure of oblivion for the past as will protect him from having it ransacked by mere volunteers; and independent of this general sanction, if witnesses were to be compelled to answer fishing questions as to any scandals in their past lives, the witness box would become itself a scandal which no civilized community would tolerate. No witness, no matter how respectable, could be sworn, without being required, if it should please the opposing party, to have even the most remote passages of his past life explored, and without being himself compelled to narrate any events in that life which were discreditable; no matter for how long a time such discredit had been atoned by penitence, by reformation, and by correction of the wrong. Such inquisitions, however, the courts have refused to permit; and it has hence been held, not only, as we will see, that parties are bound by collateral answers they wring from a witness as to his history;⁶ but that the witness will not

For the purpose of discrediting witness, answers will not be compelled to questions imputing disgrace.

¹ *Roberts v. Allott*, 1 M. & M. 192; *Parkhurst v. Lowten*, 1 Mer. 400; *Williams v. Farrington*, 2 Cox Ch. R. 202; *Davis v. Reid*, 5 Sim. 443; *People v. Mather*, 4 Wend. 229; *Close v. Olney*, 1 Denio, 319; *Moloney v. Dows*, 2 Hilt. (N. Y.) 247; *U. S. v. Smith*, 4 Day, 121; *Weldon v. Burch*, 12 Ill. 374; *Floyd v. State*, 7 Tex. 215.

² See *R. v. Strachan*, 7 Cox, 65; *R. v. Skeen*, 8 Cox, 143; *R. v. Buttle*,

11 Cox, 566; *Fernandez, ex parte*, 10 C. B. N. S. 3; *R. v. Hulme*, L. R. 5 Q. B. 277; *Wilkins v. Malone*, 14 Ind. 153; *Douglass v. Wood*, 1 Swan, 393; *State v. Quarles*, 13 Ark. 397. See *State v. Henderson*, 17 Ind. 127; *Clark v. Reese*, 35 Cal. 89.

³ *People v. Kelly*, 24 N. Y. 71.

⁴ *U. S. v. Brown*, 1 Sawyer, 531.

⁵ *Emery's case*, 107 Mass. 172.

⁶ *Infra*, § 547.

be compelled to answer such questions when they are only introduced in order to discredit him, and are not essential to the merits of the case of the party asking them.¹

§ 542. On the other hand, a witness cannot ward off answering a question material to the issue on the ground that it imputes disgrace to himself, such disgrace not amounting to crimination.² Thus in a prosecution for bastardy, a witness, introduced by the defendant to prove that the plaintiff had sexual intercourse with another man about

Witness
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¹ *R. v. Hodgson*, R. & R. 211; *Dodd v. Norris*, 4 Camp. 519; *Friend's case*, 4 St. Tr. 225; *Lewis's case*, 4 Esp. 225; *McBride v. McBride*, 4 Esp. 242; *U. S. v. Dickinson*, 2 McLean, 325; *State v. Staples*, 47 N. H. 113; *Smith v. Castles*, 1 Gray, 108; *People v. Her- rick*, 13 Johns. R. 82; *Lohman v. People*, 1 Comst. 379; *S. C. 2 Barb.* 217; *Lewis, in re*, 39 How. (N. Y.) Pr. 155; *Resp. v. Gibbs*, 3 Yeates, 429; *Galbreath v. Eichelberger*, 3 Yeates, 515; *State v. Bailey*, 1 Penn. (N. J.) 415; *Vaughn v. Perrine*, 2 Penn. (N. J.) 534; *Houser v. Com.* 51 Penn. St. 332; *Howel v. Com.* 5 Grat. 664; *Forney v. Ferrell*, 4 West Va. 729; *Leach v. People*, 53 Ill. 311; *Toledo R. R. v. Williams*, 77 Ill. 354; *State v. Garrett*, 1 Busbee, 357; *Campbell v. State*, 23 Ala. 44; *Marx v. Bell*, 48 Ala. 497; *Harper v. R. R.* 47 Mo. 567.

In *Real v. People*, 42 N. Y. 270, it was said by Grover, J.: "My conclusion is, that a witness upon cross-examination may be asked whether he has been in jail, the penitentiary, or state prison, or any other place that would tend to impair his credibility, and how much of his life he has passed in such places. When the inquiry is confined as to whether he has been convicted, and of what, a different rule may perhaps apply. This involves questions as to the jurisdiction and

proceedings of a court of which the witness may not be competent to speak. This was the point involved in *Griswold v. Newcomb*, 24 N. Y. 298, and the only point in that case. Here the inquiry was simply whether and how long the witness had been in the penitentiary. This the witness knew and could not be mistaken about. . . . The extent of the cross-examination of this character is somewhat in the discretion of the court, and must necessarily be so to prevent abuse." So, also, *Wilbur v. Flood*, 16 Mich. 40; *State v. March*, 1 Jones L. (N. C.) 526; *State v. Garrett*, Busbee L. (N. C.) 357; *Com. v. Bonner*, 97 Mass. 587; *People v. Manning*, 48 Cal. 335, sustaining such questions. Ordinarily convictions must be proved by record. *Clement v. Brooks*, 13 N. H. 92; *Com. v. Quin*, 5 Gray, 478; *Newcomb v. Griswold*, 24 N. Y. 298; *Stout v. Russell*, 2 Yeates, 334; *People v. Reinhardt*, 39 Cal. 449. *Supra*, §§ 63, 64; *infra*, § 991.

See Am. Law Rev. Jan. 1877, 396.

² See cases cited in prior section; *Whart. Cr. L.* 7th ed. § 807; *Com. v. Curtis*, 97 Mass. 574; *Burnett v. Phallon*, 11 Abb. (N. Y.) Pr. 157; *Hunt v. McCalla*, 20 Iowa, 20; *Ragland v. Wickware*, 4 J. J. Marsh. 530; *Rowe, ex parte*, 7 Cal. 184; *Clark v. Reese*, 35 Cal. 89; *Ward v. State*, 2 Mo. 98; *Clementine v. State*, 14 Mo. 112.

the time of the begetting of the child, has been compelled to answer whether he had such intercourse with her, she having denied that she had such intercourse with any one but the defendant.¹ So in an action for enticing away the plaintiff's wife, where the answer was that the wife was driven from home by her husband's immorality, it was held that the plaintiff, when examined as a witness, could be compelled to answer as to such immorality.²

when such questions are material to the issue.

¹ *Hill v. State*, 4 Ind. 112.

² *Taylor v. Jennings*, 7 Rob. (N. Y.) 581.

In England the same distinction is maintained. When a question is not material to the issue, and its object is merely to degrade the character of the witness, he is not compellable to answer it. Thus, on a charge of rape, or indecent assault, the prosecutrix cannot be compelled to say whether she has had connection with other men, or particular persons; nor can evidence of such connection be received, for if she has once denied it, her answer is final. *R. v. Holmes*, 41 L. J. M. C. 12; 20 W. R. 123; L. R. 1 C. C. R. 334. The Indian law is different. See Ind. Ev. Act, s. 155. So, in an action of seduction, the woman is not compelled to say whether she has had connection with other men previous to the alleged seduction; but the defendant may prove such previous connection in reduction of damages. *Dodd v. Norris*, 3 Camp. 519. *Powell's Evidence*, 4th ed. 117.

"In equity this rule is carried even further than at common law. A witness will not be compelled to answer any question which would subject him to a criminal charge, or to any pains or penalties, or to ecclesiastical censure, or to a forfeiture of interest; and the protection is said to be extended even to cases where the answer would prove the witness guilty of great moral turpitude, subjecting him to penal con-

sequences." *Wigram on Discovery*, 81; *Mitford on Pleading*, 194. "But when the reason for the privilege ceases, the privilege will cease also. Therefore, if a penalty or forfeiture would enure for the benefit of a plaintiff, and he waives the same, or when the time for suing for a penalty has expired, a witness is compelled to answer, as also he is if by contract he is bound to answer, notwithstanding the consequences." *Wigram on Discovery*, 83; *Powell's Evidence*, 4th ed. 117.

In Iowa we have the following: —

"On the cross-examination of the plaintiff as a witness, she was asked by the appellant's counsel the following question: 'Did you, before this time (referring to the time of the alleged seduction), have intercourse with other men?' The witness refused to answer on the ground of privilege. Appellant's counsel requested the court to compel her to answer the question, but the court sustained the witness in her refusal.

"Our statute provides 'that no witness is excused from answering a question upon the mere ground that he would thereby become subjected to a civil liability. But when the matter sought to be elicited would tend to render him criminally liable, or expose him to public ignominy, he is not compelled to answer,' &c. *Revision*, §§ 3988, 3989. This term 'ignominy,' means shame, disgrace, dishonor. See *Webster's Unabridged Dict.* 'Public

§ 543. As we have already seen, a witness cannot at common law be examined, for the purpose of discrediting or excluding him, as to his religious belief.¹ This rule, it is held in Massachusetts, is unaffected by the statute removing disability on account of religious disbelief, but permitting evidence of such disbelief in order to affect

ignominy,' therefore, means public disgrace, public dishonor. The matter sought to be elicited by the question would, most clearly, tend to bring the witness into public disgrace; for, by the question the appellant sought to show that, prior to her seduction, the witness had illicit intercourse with other men than the defendant. It was the right of the witness, therefore, to refuse to answer, and there was no error in the ruling of the court on this point. The case of the State v. Sutherland, 30 Iowa, 570, cited by appellant, has no application to this question. That was a criminal prosecution for seduction, in which the prosecutrix is an essential ingredient of the offence, and the witness in that case did not refuse to answer the interrogatory propounded to her in respect to her previous conduct with other men. In that case the court, on objection by the state, refused to allow the question to be put to the witness." Miller, Ch. J., *Brown v. Kingsley*, 38 Iowa, 221.

In a judicious article in the London Law Journal, reprinted in the Albany Law Journal for 1876, p. 281, we have the following observations: "Experience, apart from fairness, teaches that legal rights are double-edged weapons, which a man should use carefully. So it is with cross-examination to credit. Counsel may find in his brief material for the injury of a witness; but the business of counsel is

to succeed in the cause, and an outrage on the feelings of a witness may be resented by a jury. Arbitrators are notoriously averse to attacks of this class on the credit of witnesses, and it is hardly ever good policy to attempt anything of the kind in the conduct of references. Counsel have also to reckon with the judge; and the strength of strong judges is not wisely provoked to adverse action where jurors and audience would instinctively not assent to a crushing summing-up. There is also the counsel's own sense of right. Nothing can be more monstrous than for a counsel to ask a question calculated to torture not only the witness, but a host of innocent persons nearly connected with the witness, merely because the question is in the brief, and the client wishes it to be asked. Counsel is bound in honor, and out of respect to himself and his profession, to consider whether the question ought to be asked, not whether his client would like it put. Counsel is not the mouth-piece of spite or revenge. He is not to adopt a line of conduct which, if universally carried out, would drive truth out of court by intimidating witnesses. Among other considerations, he should weigh with himself whether the expected answer ought to render the witness unworthy of belief on his oath; whether the act to be revealed is of recent date, so as to make it improbable that the witness has repented his misconduct, and striven to amend his ways. In some

¹ See *supra*, § 396.

credibility.¹ In New York a different conclusion is reached, under the Constitution of 1848, which permits atheists to testify.² That such questions cannot be put to affect competency, we have already seen.³ The same reasoning, it should be added, does not necessarily apply when the question is as to credibility.

§ 544. Where the question goes to the motives of the witness in testifying, he will be compelled, on reasoning already stated, to answer.⁴ Thus a witness for the prosecution, on a trial for riot, has been compelled to say whether he did not belong to a secret society organized to suppress a sect to which the defendant belonged.⁵ So answers may be compelled to any questions as to the witness's corrupt or interested leanings in the case.⁶ So as to matters connected with the *res gestae* a witness may be compelled to answer questions, no matter how much charged with disgrace.⁷ And while courts have refused to permit a witness to

And so as to questions as to motive or veracity or to the *res gestae*.

cases, also, counsel may, perhaps, consider whether the good to accrue to his client from the answer is not so small as to compare with the enormous mischief to be done to the witness, and to other persons, as to justify him in declining to put the question. We admit that no definite set of rules can be prescribed for counsel. He must judge for himself; and he will have the consolation of knowing that he is not very likely to go wrong if he acts on his own opinion, instead of inclining his ear to the remorseless passion or the unscrupulous greed of the party for whom he is retained."

"Everybody recollects the famous question on the trial of Orton, which has generally been held unjustifiable, mainly on the ground that the relations between the sexes have no direct bearing on the probability of the witness telling the truth."

Mr. Fitzjames Stephen, in his Digest of the Law of Evidence, expounds the law as follows: "When a witness is cross-examined he may be asked any questions which tend (1.) to test his accuracy, veracity, or credibility; or

(2.) to shake his credit by injuring his character. He may be compelled to answer any such question, however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself, except in the case provided for in article 120, namely, when the answer might expose him to a criminal charge or penalty."

¹ Com. v. Burke, 16 Gray, 33.

² Stanbro v. Hopkins, 28 Barb. 265.

³ Supra, § 396.

⁴ Supra, § 408; Kelsey v. Ins. Co. 35 Conn. 225; People v. Morigan, 25 Mich. 5; McFarlin v. State, 41 Tex. 23; and see *infra*, § 561.

⁵ People v. Christie, 2 Parker C. R. 579.

⁶ State v. Dee, 11 Minn. 35. This has been pushed to a great extent by Best, J., in Cundell v. Pratt, M. & M. 108; and by Lord Tenterden, in Roberts v. Allatt, M. & M. 192.

⁷ Cundell v. Pratt, 1 M. & M. 108; U. S. v. White, 5 Cranch C. C. 38; People v. Mather, 4 Wend. 250; Berney v. Mitnacht, 2 Sweeny, 582; Hill v. State, 4 Ind. 112; Foster v. People, 18 Mich. 266.

be examined as to past irrelevant misconduct, yet questions have been permitted tending to search his conscience as to such recent infamy as leaves his testimony entitled to little respect.¹ The same rule applies to questions probing veracity.² If a criminal conviction can be put in evidence to discredit a witness,³ he may be asked as to the collateral incidents of such conviction.

§ 545. Apart from such questions as impute disgrace or crime, a witness may be compelled to answer all questions concerning his relationship to either of the parties, his interest in the suit, his capacity of discernment and expression, his motives, and his prejudices. He may be thus required to explain whatever would show bias on his part or incapacity to testify accurately.⁴

§ 546. However sternly it may be proclaimed by statute or judgment that no inference is to be drawn against a witness from his refusal to answer an inquiry as to misconduct, the inference is one which is technically logical, and which in ordinary cases it is both natural and permissible for juries to draw.⁵ It is true that a pure man of great sensitiveness may indignantly refuse to tolerate such a question; but if the witness be not known to be a pure man of great sensitiveness, his refusal to answer will be

¹ *Cundell v. Pratt*, M. & M. 108; *Roberts v. Allatt*, M. & M. 192; *Real v. People*, 42 N. Y. 270.

² *Ordway v. Haynes*, 50 N. H. 159; *Boles v. State*, 46 Ala. 204.

³ *Supra*, § 542; *infra*, § 567.

⁴ See § 408; *Drew v. Wood*, 26 N. H. 363; *Hutchinson v. Wheeler*, 35 Vt. 330; *McIntyre v. Park*, 11 Gray, 102; *Day v. Stickney*, 14 Allen, 255; *Atwood v. Welton*, 7 Conn. 66; *Mechanics' Bank v. Smith*, 19 Johns. R. 115; *Bennett v. Burch*, 1 Denio, 141; *Newton v. Harris*, 6 N. Y. 345; *People v. Christie*, 2 Park. C. R. 579; *Breinig v. Meitzler*, 23 Penn. St. 156; *Bricker v. Lightner*, 40 Penn. St. 199; *Blessing v. Hape*, 8 Md. 31; *Phillips v. Elwell*, 14 Oh. St. 240; *Huckleberry v. Riddle*, 29 Ind. 454;

Ray v. Bell, 24 Ill. 444; *First Nat. Bk. v. Haight*, 55 Ill. 191; *Crippen v. People*, 8 Mich. 117; *Dann v. Cudney*, 13 Mich. 239; *Kellogg v. Nelson*, 5 Wisc. 125; *Suit v. Bonnell*, 33 Wisc. 180; *State v. Oscar*, 7 Jones L. 305; *Stoundenmeier v. Williamson*, 29 Ala. 558; *Pool v. Pool*, 33 Ala. 145; *Winston v. Cox*, 38 Ala. 268; *Bullard v. Lambert*, 40 Ala. 204; *State v. Adams*, 14 La. An. 620; *Dick v. State*, 30 Miss. 631; *Newcomb v. State*, 37 Miss. 383; *Coates v. Hopkins*, 34 Mo. 135; *Harper v. Lamping*, 33 Cal. 641; *Bixby v. State*, 15 Ark. 395; *Thornburgh v. Hand*, 7 Cal. 554.

⁵ See *Taylor's Ev.* § 1321, citing *Bayley, J.*, in *R. v. Watson*, 2 Stark. R. 153. See *Andrewes v. Fry*, 104 Mass. 234.

naturally presumed to arise from the fact that if he answered the answer would be discreditable.¹

§ 547. As will hereafter be seen, a witness's answers on cross-examination to collateral questions cannot be disputed.² A witness's answers to questions relating to his previous conduct are regarded as so far collateral that they cannot be contradicted by the party cross-examining, unless it be as to matter which the law permits to be shown for the purpose of impairing credibility.³

On cross-examination witness's answers as to previous character are conclusive, and so as to matters collateral.

§ 548. Even a party when cross-examined as a witness, as to previous misconduct similar to that under trial, concludes the party cross-examining him by his answers, unless such misconduct would be itself relevant as part of the case of the cross-examining party.⁴ To let in such evidence would be to abrogate the fundamental principle that a party is only to be tried on a particular issue, and that on such issue evidence of independent misconduct is inadmissible.⁵ But this principle applies only to the witness's *answers*. Whether the *questions* can be put is elsewhere discussed.⁶

XI. IMPEACHING WITNESS.

§ 549. By a technical rule of the English common law, while a party may contradict his own witnesses, though this may discredit them, he is not ordinarily permitted to impeach them, even though called afterwards by the opposite side, either by general evidence, or by proof of prior contradictory statements.⁷ By calling the witness, so it is

Party cannot discredit his own witness.

¹ See *infra*, § 1265.

² See *infra*, § 559.

³ *Goddard v. Parr*, 24 L. J. Ch. 784; *Taylor's Ev.* § 1295; *Odiorne v. Winkley*, 2 Gall. 51; *Seavy v. Dearborn*, 19 N. H. 351; *Stevens v. Beach*, 12 Vt. 585; *Bivens v. Brown*, 37 Ala. 422; *Cornelius v. Com.* 15 B. Mon. 539.

⁴ *Tolman v. Johnstone*, 2 F. & F. 66.

⁵ See, also, *Baker v. Baker*, 3 Sw. & Tr. 213. See *supra*, §§ 29, 533.

⁶ *Ibid.* See *Shepard v. Parker*, 36 N. Y. 517.

⁷ *Ewer v. Ambrose*, 3 B. & C. 746; *Chamberlain v. Sands*, 27 Me. 458; *Com. v. Starkweather*, 10 Cush. 59; *Com. v. Welsh*, 4 Gray, 535; *Adams v. Wheeler*, 97 Mass. 67; *Bullard v. Pearsall*, 53 N. Y. 230; *Coulter v. Express Co.* 56 N. Y. 588; *People v. Safford*, 5 Denio, 112; *Brewer v. Poreh*, 17 N. J. L. 377; *Stearns v. Bank*, 53 Penn. St. 490; *Rockwood v. Poundstone*, 38 Ill. 199; *Quinn v. State*, 14 Ind. 589; *Hunt v. Coe*, 15 Iowa, 197; *Montgomery v. Hunt*, 5 Cal. 366; *People v. Jacobs*, 49 Cal. 384;

argued,¹ a party represents him to the court as worthy of credit, or at least not so infamous as to be wholly unworthy of it; and if he afterwards attack his general character for veracity, this is not only *mala fides* towards the tribunal, but it “would enable the party to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him.”²

Craig v. Grant, 6 Mich. 447; Roundtree v. Tibbs, 4 Hayw. 108; Perry v. Massey, 1 Bailey, 32; McDaniel v. State, 53 Ga. 253; Griffin v. Wall, 32 Ala. 149; Fairly v. Fairly, 38 Miss. 280; Young v. Wood, 11 B. Monr. 123. See Am. Law Rev. Jan. 1877, 261.

¹ Best's Ev. § 645.

² B. N. P. 297; 2 Phill. Ev. 525.

In England, by statute, when a witness, in the opinion of the judge, is hostile to the party calling him, the witness may be contradicted by other evidence, or by leave of the judge, proof may be made that the witness has at other times made inconsistent statements; though in the latter case the “circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.” See on the construction of this statute, Taylor's Ev. § 1282-3, citing *Greenough v. Eccles*, 5 C. B. N. S. 806; *Faulkner v. Brine*, 1 Fost. & F. 254; *Dear v. Knight*, 1 Fost. & F. 433; *Pound v. Wilson*, 4 Fost. & F. 301; *Reed v. King*, 30 L. T. 290, Exc.; *Jackson v. Thomason*, 1 B. & S. 745; *Coles v. Coles*, L. R. 1 P. & D. 70. As to subscribing witnesses, see *supra*, § 500. A provision substantially the same, borrowed from the English statute, is found in the Code of Massachusetts. *Ryerson v. Abington*, 102 Mass. 530.

The Massachusetts statute, above noticed, is thus commented on: “The St. of 1869, c. 425, which took effect

before the trial, provides that the party producing a witness ‘may contradict him by other evidence, and may also prove that he has made at other times statements inconsistent with his present testimony; but, before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statements, and, if so, allowed to explain them.’ This statute abrogates the rule of common law, by which a party who had called a witness was deemed to have held him out as worthy of credit, and was therefore not allowed to prove by other witnesses statements previously made by him, inconsistent with his present testimony, which would not be admissible as independent evidence, and which could have no effect but to impair his credit with the jury. *Adams v. Wheeler*, 97 Mass. 67, and cases cited. It is taken, almost verbatim, from the English statute of 17 & 18 Vict. c. 125, § 22, omitting, however, the qualification of that act, ‘in case the witness shall in the opinion of the judge prove adverse’ — and the limit of the right to prove such inconsistent statements ‘by leave of the judge’ only; but yet does not allow such statements to be proved, without giving the witness the full notice and opportunity to explain, to which a witness called by the opposite party is entitled by the practice of the courts of England, of the United

In this country, while a party cannot ordinarily discredit his own witness, his right to contradict such witness is unquestioned.¹ We have also held that, even at common law, adverse witnesses, who tell a story contradicting that which they had previously given, may, on the party calling them being thus surprised, be examined as to their former statements, in all cases where it would appear that a deception has been practised on the party examining, and that he has been guilty of no negli-

States, and of New York, though not by that of our own. 2 Taylor on Ev. (4th ed.) §§ 1282, 1300; Conrad v. Griffey, 16 How. 38, 46, 47; Pendleton v. Empire Stone Dressing Co. 19 N. Y. 13; Gould v. Norfolk Lead Co. 9 Cush. 338.

“So great a change in the rules of evidence, giving so extensive a power to a party to introduce proof in contradiction and disparagement of a witness put on the stand by himself, uncontrolled by the discretion of the judge before whom the trial is had, must be kept strictly within the bounds of the statute, and certainly cannot be construed as enabling a party to contradict his own witness in any respect in which the law would not permit him to contradict a witness produced by the opposite party.

“We are of opinion that the statute did not warrant the admission of the testimony objected to, for two reasons: First, the surveyor, whose testimony was sought to be contradicted, had only been asked generally whether or not he had made such statements to the other witness; and no ‘circumstances of the supposed statement, sufficient to designate the particular occasion,’ had been mentioned to him, as the statute expressly requires. Angus v. Smith, Mood. & Malk. 473; Crowley v. Page, 7 C. & P. 789; Conrad v. Griffey, and Pendleton v. Empire Stone Dressing Co., above cited. And, secondly, the testimony which

was sought to be contradicted was to mere matter of opinion, would have been incompetent, if objected to; and, being irrelevant and immaterial, could not have been contradicted, if elicited in cross-examination from a witness called by the opposite party. Lincoln v. Barre, 5 Cush. 590; Brockett v. Bartholomew, 6 Met. 396; Elton v. Larkins, 5 C. & P. 385; Tennant v. Hamilton, 7 Cl. & Fin. 172; S. C. Mael. & Rob. 821.” Gray J., Ryerson v. Abington, 102 Mass. 539. See, also, to a case of the admission of such evidence under the statute, Day v. Cooley, 118 Mass. 526. That under the same statute a party cannot contradict his own witness by proof of prior inconsistent statements, without first calling his attention to such statements, see further Newell v. Homer, 120 Mass. 278.

¹ U. S. v. Watkins, 3 Cranch C. C. 441; Brown v. Osgood, 25 Me. 505; Swamscot v. Walker, 22 N. H. 457; Brannon v. Hursell, 112 Mass. 63; Warren v. Chapman, 115 Mass. 584; Whitney v. R. R. 9 Allen, 364; Olmstead v. Bank, 32 Conn. 278; Lawrence v. Barker, 5 Wend. 301; Stockton v. Demuth, 7 Watts, 39; Wolfe v. Hauver, 1 Gill, 84; Rockwood v. Poundstone, 38 Ill. 299; Thorn v. Moore, 21 Iowa, 285; Spencer v. White, 1 Ired. L. 136; Shelton v. Hampton, 6 Ired. L. 216; Bradford v. Bush, 10 Ala. 386; Brown v. Wood, 19 Mo. 475; Norwood v. Kenfield, 30

gence or laches.¹ In England, the right to ask as to such former statements has been much agitated, though the weight of authority is against the right so to impeach, unless with the limitation just expressed.² On the other hand it is urged³ "that, although a party who calls a person of bad character as witness, knowing him to be such, ought not to be allowed to defeat his testimony because it turns out unfavorable to him, by direct proof of general bad character, — yet it is only just that he should be permitted to show, if he can, that the evidence has taken him by surprise, and is contrary to the examination of the witness, preparatory to the trial; that this course is necessary, as a security against the contrivance of an artful witness, who otherwise might recommend himself to a party by the promise of favorable evidence (being really in the interest of the opposite party), and afterwards by hostile evidence ruin his cause; that the rule, with the above exception, as to offering contradictory evidence, ought to be the same, whether the witness is called by the one party or the other, and that the danger of the jury's treating the contradictory matter as substantive testimony, is the same in both cases; that, as to the supposed danger of collusion, it is extremely improbable, and would be easily detected. It may be further remarked, that this is a question, in which not only the interests of litigating parties are involved, but also the more important general interests of truth, in criminal as well as in civil proceedings; that the ends of justice are best attained, by allowing a free and ample scope for scrutinizing evidence and estimating its real value; and that in the administration of criminal justice, more especially, the exclusion of the proof of contrary statements might be attended with the worst consequences." So far, however, as concerns impeaching witnesses generally, this view does not now obtain.⁴ But a party *bonâ fide* surprised at

Cal. 393; *People v. Jacobs*, 49 Cal. 384.

¹ *State v. Lull*, 37 Me. 246; *State v. Benner*, 64 Me. 267; *Cronan v. Cotting*, 99 Mass. 334; *Brown v. Bel- lows*, 4 Pick. 179; *Bullard v. Pearsall*, 53 N. Y. 230; *Bank of North Lib. v. Davis*, 6 W. & S. 285.

² See 2 Phil. Ev. 528 (10th ed.); *Melhuish v. Collier*, 15 Q. B. 578.

³ Ph. & An. Ev. 905.

⁴ "Whatever differences of opinion have existed elsewhere, I understand the rule in this state to be settled, that a party may not impeach, either by general evidence or by proof of contradictory statements made out of court, a witness whom he has presented to the court as worthy of credit. He may contradict him as to a fact

the unexpected testimony of his witness may be permitted to interrogate the witness, as to previous declarations alleged to have been made by the latter, inconsistent with his testimony, the object being to probe the witness's recollection, and to lead him, if mistaken, to review what he has said. Such corrective testimony, also, is receivable, to explain the attitude of the party calling the witness. But where the sole object of the testimony so offered is to discredit the witness, it will not be received.¹

material in the cause, although the effect of that proof may be to discredit him, but he can not adduce such a contradiction when it is only material as it bears upon credibility. Thus, in this case, the plaintiff was at liberty to contradict the witness as to his not having driven on the walk, because that fact was generally material in the cause, but was not at liberty to show that, after the affair was over, he had made a statement which conceded that he had driven on the walk; because that statement did not bear upon the question whether he did or did not drive upon the walk, but only upon the question whether his testimony that he did not was worthy of belief. In *People v. Safford*, 5 Denio, 112, where this point was material, the court, after adverting to the conflict of cases and text-books on the subject, proceeded, as is said, to consider it on principle and determine that a party cannot prove contradictory statements made by his own witness. The court held that such evidence is only allowable with a view to the impeachment of the witness, and is not open to the party producing him.

"In *Thompson v. Blanchard*, 4 N. Y. 303, 311, a new trial was granted in this court for a violation of the rule in question. The plaintiff had called on Wheeler as a witness, who, among other things, had stated favorably to the defendant certain declarations made on the execution of papers material in that controversy. The

plaintiff, under objections, had been allowed to prove a contradictory version of what took place at the time in question, and also to show that Wheeler had subsequently made statements contradictory to his testimony on the trial. For the admission of this latter evidence a new trial was granted. The court, after stating the general rule, and showing that in accordance with it the plaintiff could contradict Wheeler's evidence as to what took place, proceed to say, the plaintiff went further and gave evidence that Wheeler, at a subsequent time, made statements contradictory of the statements to which he testified. Such evidence is only allowable, in any case, with a view to the impeachment of the witness, — a ground not open to the party producing the witness.

"There is a class of cases in which a party who calls a witness has been allowed to show, by his own examination at least, if not by introducing proof by others, that he had previously stated the facts in a different manner; but this seems to stand upon the ground of surprise, as contrary to what the party had a right or was led to believe he would testify, or of deceit through the influence of the other party. 1 Greenl. § 444, and note 1; *Melhuish v. Collier*, 15 Ad. & El. (N. R.) 878 (69 Eng. Com. Law). But no such special ground of exception appears in this case." *Johnson, J., Coulter v. Express Co.* 56 N. Y. 588.

¹ *Ibid.*; *Bullard v. Pearsall*, 53 N.

§ 550. It sometimes becomes important, in view of the rule just stated, as well as of that which gives the right of cross-examination to an adverse party, to determine who are a party's witnesses, in such a sense that they cannot be discredited or cross-examined by him. A party, it may be said at the outset, who calls and causes to be sworn a competent witness, *primâ facie* makes such witness his own, so as to open the witness to cross-examination by the opposite side.¹ It is otherwise, however, if such witness be called and sworn by mistake, and is dismissed before questions are asked;² or if he be called for merely formal purposes (*e. g.* to prove an instrument);³ or if the witness's examination be stopped at the outset by the judge;⁴ or if there be a manifest surprise in the testimony.⁵ *A fortiori*, the mere enforcing the attendance of a witness by a subpœna does not make him the witness of the party who issues the subpœna, if the witness be not sworn.⁶ In any view, a party surprised at the testimony of a witness is entitled, as we have already seen, to cross-examine the witness as to whether he has not previously made contradictory statements, though not to contradict the witness's answers.⁷

Y. 230, quoted in § 550. See an interesting article on this topic in Am. Law Rev. Jan. 1877, 261.

¹ Wood v. Mackinson, 2 M. & Rob. 273; Reed v. James, 1 Stark. R. 132; R. v. Brooke, 2 Stark. R. 472; Toole v. Nichol, 43 Ala. 406; Page v. Kankey, 6 Mo. 433; Brown v. Burrus, 8 Mo. 26.

² Rush v. Smith, 1 C., M. & R. 94; Clifford v. Hunter, 3 C. & P. 16; Wood v. Mackinson, 2 M. & Rob. 273; Beebe v. Tinker, 2 Root, 160; Austin v. State, 14 Ark. 555. Though see Linsley v. Linsley, 26 Vt. 123; Lunday v. Thomas, 26 Ga. 537.

³ Watson v. Ins. Co. 2 Wash. C. C. 480; Dennett v. Dow, 17 Me. 19; Shorrey v. Hussey, 32 Me. 579; Harden v. Hays, 9 Penn. St. 151; Williams v. Walker, 2 Rich. Eq. 291; Thornton v. Thornton, 39 Vt. 122. See Beal

v. Nichols, 2 Gray, 262. See *infra*, § 730. *Supra*, § 500.

⁴ Creevy v. Carr, 7 C. & P. 64.

⁵ Melhuish v. Collier, 15 Ad. & El. (N. S.) 878; People v. Safford, 5 Denio, 118; Sanchez v. People, 22 N. Y. 147; Harden v. Hays, 9 Penn. St. 151; Com. v. Lamberton, 2 Brewst. 565; Champ v. Com. 2 Metc. (Ky.) 17.

⁶ Summers v. Moseley, 2 C. & M. 477; Perry v. Gibson, 1 A. & E. 48; Davis v. Dale, 4 C. & P. 335.

⁷ "Where a witness disappoints the party calling him, by testifying contrary to the expectations and wishes of such party, it is a conceded rule that the latter shall not, for the purpose of relieving himself from the effect of such evidence, be permitted to prove that the witness is a person of bad character and unworthy of belief. There is also a great weight of

§ 551. A witness called by the opposing party can, it is conceded on all sides, be discredited by proving that on a former occasion he made a statement inconsistent with his statement on trial, provided such statement be material to the issue.¹ But the statement which it is

Opposing witness may be contradicted by proving

authority sustaining the position that, under such circumstances, the party calling the witness should not be allowed to prove that he has on other occasions made statements inconsistent with his testimony at the trial, when the sole object of such proof is to discredit the witness. But it is well established that the party calling the witness is not absolutely bound by his statements, and may show by other witnesses that they are erroneous. The further question has frequently arisen whether the party calling the witness should, upon being taken by surprise by unexpected testimony, be permitted to interrogate the witness in respect to his own previous declarations, inconsistent with his evidence. Upon this point there is considerable conflict in the authorities. We are of opinion that such questions may be asked of the witness for the purpose of probing his recollection, recalling to his mind the statements he has previously made, and drawing out an explanation of his apparent inconsistency. This course of examination may result in satisfying the witness that he has fallen into error, and that his original statements were correct, and it is calculated to elicit the truth. It is also proper, as showing the circumstances which induced the party to call him. Though the answers of the witness may involve him in contradictions calculated to impair his credibility, that is not sufficient reason for excluding the inquiry. Proof by other witnesses that his statements are incorrect, would have the same effect, yet the admissibility of such

proof cannot be questioned. It is only evidence offered for the mere purpose of impeaching the credibility of the witness, which is inadmissible when offered by the party calling him. Inquiries calculated to elicit the facts, or to show to the witness that he is mistaken and to induce him to correct his evidence, should not be excluded simply because they may result unfavorably to his credibility. In case he should deny having made previous statements inconsistent with his testimony, we do not think it would be proper to allow such statements to be proved by other witnesses; but where the questions as to such statements are confined to the witness himself, we think they are admissible. As a matter of course, such previous unsworn statements are not evidence, and, when a trial is before a jury, that instruction should be given.

“The cases in which these questions have been discussed are numerous, and we have not deemed it useful to cite them in detail, but rather to state the conclusions which we have reached, after a careful examination of the authorities. The principal cases in this state in which the subject is referred to are: *People v. Safford*, 5 Den. 118; *Thompson v. Blanchard*, 4 Comst. 311; *Sanchez v. People*, 22 N. Y. 147; and in England it is very thoroughly discussed in *Melhuish v. Collier*, 15 Adol. & Ell. N. S. 878. It has since been there regulated by act of parliament, passed in 1854.” *Rapallo, J., Bullard v. Pearsall*, 53 N. Y. 230.

¹ *Crowley v. Page*, 7 C. & P. 789;

that he
formerly
stated dif-
ferently. intended to contradict must involve facts in evidence. If confined to opinion, when opinion is not at issue, or to other irrelevant matters, the cross-examining party is bound by the answer.¹ Thus the opinion of a servant, as to whether his master was to blame in a collision, being ir-

Andrews v. Askey, 8 C. & P. 7; *Queen's case*, 2 B. & B. 313; *Angus v. Smith*, M. & M. 473; *Wright v. De Klyne*, Pet. C. C. 199; *U. S. v. Holmes*, 1 Cliff. 98; *State v. Kingsbury*, 58 Me. 238; *Gerrish v. Pike*, 6 N. H. 510; *Law v. Fairfield*, 46 Vt. 425; *Benjamin v. Wheeler*, 8 Gray, 409; *Emerson v. Stevens*, 6 Allen, 112; *Tyler v. Pomeroy*, 8 Allen, 480; *Marsh v. Hammond*, 11 Allen, 483; *Carruth v. Bayley*, 14 Allen, 532; *Foot v. Hunkins*, 98 Mass. 523; *Hook v. George*, 108 Mass. 324; *Com. v. Bean*, 111 Mass. 438; *Beardsley v. Wildman*, 41 Conn. 516; *Honstine v. O'Donnell*, 5 Hun, 472; *Schell v. Plumb*, 55 N. Y. 592; *Stahle v. Spohn*, 8 Serg. & R. 317; *Cowden v. Reynolds*, 12 Serg. & R. 281; *Com. v. Marrow*, 3 Brewst. 402; *Schlater v. Wimpenny*, 75 Penn. St. 321; *Pittsburg R. R. v. Andrews*, 39 Md. 329; *Mimms v. State*, 16 Oh. St. 221; *Forde v. Com.* 16 Grat. 547; *Stewart v. People*, 23 Mich. 63; *Galena R. R. v. Fay*, 16 Ill. 558; *Craig v. Rohrer*, 63 Ill. 325; *Harris v. State*, 30 Ind. 131; *State v. Pulley*, 63 N. C. 8; *State v. Johnson*, 12 Minn. 476; *Williamson v. Peel*, 29 Iowa, 458; *Keerans v. Brown*, 68 N. C. 43; *Floyd v. Wallace*, 31 Ga. 688; *Powers v. State*, 44 Ga. 209; *State v. Marler*, 2 Ala. 43; *Moore v. Jones*, 13 Ala. 296; *Flash v. Ferri*, 34 Ala. 186; *Garret v. State*, 6 Mo. 1; *McKern v. Calvert*, 59 Mo. 244; *State v. Mulholland*, 16 La. An. 376; *Lewis v. State*, 4 Kans. 296; *McDaniel v. Baca*, 2 Cal. 326; *People v. Robles*, 29 Cal. 421; *People v. Devine*, 44 Cal. 452.

"We are of the opinion that one of the exceptions taken by the defendant at the trial must be sustained. For the purpose of contradicting *Addison A. Moseley*, who was a witness for the tenant, the defendant offered the written answers of the witness made by him in an examination under oath before a register in bankruptcy, but the court excluded them. We think these answers should have been admitted. They fall within the rule which allows a witness to be impeached by proof that he has made conflicting statements at other times. The fact that the examination was not completed and the answers not signed, affects the weight of the testimony, but does not render it incompetent. The answers, though not written by the hand of the witness, were reduced to writing by his agent, at his dictation, and were admissible as his statements. The case is within the principle of *Lynde v. McGregor*, 13 Allen, 182." *Morton, J., Knowlton v. Moseley*, 110 Mass. 138.

¹ *Greenl. Ev.* § 449; *Elton v. Larkins*, 5 C. & P. 385; *Brackett v. Weeks*, 43 Me. 291; *Dewey v. Williams*, 43 N. H. 384; *Sumner v. Crawford*, 45 N. H. 416; *Combs v. Winchester*, 49 N. H. 13; *Fletcher v. R. R.* 1 Allen, 9; *Com. v. Mooney*, 110 Mass. 99; *Howard v. Ins. Co.* 4 Denio, 502; *Bearss v. Copley*, 10 N. Y. 93; *Patten v. People*, 18 Mich. 314. See *State v. Reed*, 60 Me. 550; *McKern v. Calvert*, 59 Mo. 244; *McNeill v. Arnold*, 22 Ark. 477.

relevant, evidence of former conflicting declarations of the servant cannot be received in contradiction.¹ Opinion, however, or statement that goes to show bias, is so far relevant, that a denial of its expression is admissible.² So the opinion of an expert is material, and may be contradicted by proof that he had previously expressed contradictory opinions.³

§ 552. It is not necessary, in order to introduce such contradictory evidence, that it should contradict statements made by the witness in his examination in chief. Ordinarily the process is to ask the witness on cross-examination whether on a former occasion he did not make a statement conflicting with that made by him on his examination in chief. But the conflict may take place as to matters originating in the cross-examination; and then, if such matters are material, contradiction by this process is equally permissible.⁴ Thus when the prosecuting witness, on the trial of an indictment for an indecent assault on her when driving, on being asked on cross-examination whether she had not said to the defendant subsequent to the event in litigation, that she would kiss him if he would take her to drive, denied she had said so, it was held that she could be contradicted by calling a witness to prove that she had made such a statement.⁵

§ 553. When the question is as to former expressions of opinion in writing, it is usually enough if the writing is shown or read to the witness in advance; and then, if the genuineness of the writing is admitted or proved, it can be put in evidence.⁶ Whether the contents of such paper can be put to him, or whether it must be first shown him, has been already discussed.⁷ When the declarations were oral, it is necessary to call persons who heard them. They cannot be proved by a report contain-

¹ *Lane v. Bryant*, 9 Gray, 245.

² *Chapman v. Coffin*, 14 Gray, 454; *O'Neill v. Lowell*, 6 Allen, 110; *Emerson v. Stevens*, 6 Allen, 112; *Conillard v. Duncan*, 6 Allen, 440; *Gaines v. Com.* 50 Penn. St. 319; *Beaubien v. Cicotte*, 12 Mich. 459; *Robinson v. Blakely*, 4 Rich. (S. C.) 586. See *supra*, §§ 509-13.

³ *Saunderson v. Nashua*, 44 N. H. 492.

⁴ *Hogan v. Cregan*, 6 Robt. (N. Y.) 138.

⁵ *Com. v. Bean*, 111 Mass. 438. To the same effect, *Fries v. Brugler*, 12 N. J. L. 79. See, however, as qualifying above, *State v. Patterson*, 2 Ired. L. 346; *Dunn v. Dunn*, 11 Mich. 284.

⁶ *Romertze v. Bank*, 49 N. Y. 577; *De Sobry v. De Laistre*, 2 Har. & J. 191. See *Hamilton Co. v. Goodrich*, 6 Allen, 191.

⁷ *Supra*, § 68.

ing the evidence of a prior trial, unless such report is sworn to by a witness producing it,¹ or is signed by the impeached witness.² The witness may be contradicted by proof of prior contradictory statements before a grand jury;³ or by proof that he now states facts which on a former trial he omitted to state.⁴

✓ § 554. Generally whenever, on a former occasion, it was the duty of the witness to state the whole truth, it is admissible to show that the witness, in his statement, omitted facts sworn to by him at the trial. Thus in a Massachusetts case,⁵ a witness for the plaintiff having testified that a former owner of a piece of land had stated to him that he owned beyond the fence which was its apparent boundary, the presiding judge permitted the defendant to show that the witness was one of three appraisers of the estate of such owner, and when appraising this land did not state that the late owner claimed beyond the fence. "It was his duty, as appraiser, to inform his associates of his knowledge as to the extent of the land to be appraised; and the fact that he did not inform them that the owner claimed beyond the fence, afforded some presumption that he was mistaken when he testified that the owner had so informed him." "If a witness has made a previous statement of the transaction in regard to which he testifies, under such circumstances that he was called upon as a matter of duty or interest to state the whole truth as to the transaction, it might be competent to put such previous statement in evidence, to show that he then omitted material parts of the transaction to which he now testifies. The fact that he did not then state the omitted parts may afford some presumption that they did not happen, and thus tend to contradict his testimony. But the admissibility of such evidence depends upon the question whether the previous statement was made under such circumstances that such presumption or inference fairly arises."⁶

§ 555. When it is thus intended to discredit a witness by

¹ Webster v. Calden, 55 Me. 165; Neilson v. Ins. Co. 1 Johns. R. 301; Huff v. Bennett, 6 N. Y. 337; Boyd v. Bank, 25 Iowa, 255. See Baylor v. Smithers, 1 T. B. Monr. 6.

² Wormeley v. Com. 10 Grattan, 658.

³ See infra, § 601. Burdick v. Hunt, 43 Ind. 381.

⁴ Briggs v. Taylor, 35 Vt. 57. See Nye v. Merriam, 35 Vt. 438.

⁵ Hayden v. Stone, 112 Mass. 346.

⁶ Morton, J., Perry v. Breed, 117 Mass. 165.

showing that he has on former occasions made statements inconsistent with those made on trial, it is usually requisite to ask him, on cross-examination, whether he has not made such prior contradictory statements. The question to this effect should specify, so it is said, the person to whom the alleged contradictory statements were made, and as far as possible the circumstances. Only upon a denial, direct or qualified, by the witness, that such statements were made, can proof of them be offered. The object of this condition is to enable the witness to recall the incidents, and to explain the inconsistency, if there be such.¹ So a witness, not a party, cannot be impeached by putting in evidence his letters, unless his attention be called to these letters on his cross-examination, and the other party have an opportunity of examining him thereto.² It has been even held that where the deposition of a deceased witness had been by consent read in evidence, another and conflicting deposition of the same witness at a prior trial could not be read in order to impeach the witness, as the attention of the witness had not been called to the conflict.³ The substance of the alleged conflicting statement is all that need be put to the witness.⁴

Usually
witness
must first
be asked as
to such
statements.

¹ *Carpenter v. Wall*, 11 Ad. & El. 804; *Angus v. Smith*, 1 M. & M. 473; *R. v. Shellard*, 9 C. & P. 277; *Conrad v. Griffey*, 16 How. 38; *McKinney v. Neil*, 1 McLean, 540; *Downer v. Dana*, 19 Vt. 338; *Everson v. Carpenter*, 17 Wend. 419; *Romertze v. Bank*, 2 Sweeny, 82; *Gilbert v. Sage*, 5 Lans. 289; *Sloan v. R. R.* 45 N. Y. 125; *Gaffney v. People*, 50 N. Y. 423; though see *Clapp v. Wilson*, 5 Denio, 285; *McAtter v. McMullen*, 2 Penn. St. 32; *Wright v. Cumsty*, 41 Penn. St. 102; *Walden v. Finch*, 70 Penn. St. 460; *Franklin Bk. v. Steam Co.* 11 Gill & J. 28; *Higgins v. Carlton*, 28 Md. 115; *Unis v. Charlton*, 12 Grat. 484; *King v. Wicks*, 20 Ohio, 87; *Runyan v. Price*, 15 Oh. St. 1; *Cook v. Hunt*, 24 Ill. 535; *Root v. Wood*, 34 Ill. 283; *Winslow v. Newlan*, 45 Ill. 145; *Doe v. Reagan*, 5 Blackf. 217; *Weinzorplin v. State*, 7 Blackf. 186; *State v. Ostrander*, 18

Iowa, 435; *State v. Collins*, 32 Iowa 36; *Ketchingman v. State*, 6 Wis. 426; *Smith v. People*, 2 Mich. 415; *State v. Marler*, 2 Ala. 43; *Weaver v. Traylor*, 5 Ala. 564; *Carlisle v. Hunley*, 15 Ala. 623; *Hughes v. Wilkinson*, 35 Ala. 453; *Matthis v. State*, 33 Ga. 24; *Able v. Shields*, 7 Mo. 129; *Spaunhorst v. Link*, 46 Mo. 197; *Beebe v. De Baum*, 8 Ark. 510; *Drennen v. Lindsey*, 15 Ark. 359; *People v. Devine*, 44 Cal. 452; *Baker v. Joseph*, 16 Cal. 173; *Rice v. Cunningham*, 29 Cal. 492.

² *Leonard v. Kingsley*, 50 Cal. 628.

³ *Hubbard v. Briggs*, 31 N. Y. 518. See, also, *Runyan v. Price*, 15 Oh. St. 1.

⁴ *Patchin v. Ins. Co.* 13 N. Y. 268; *Bennett v. O'Byrne*, 23 Ind. 604; *State v. Hoyt*, 13 Minn. 132; *Edwards v. Sullivan*, 8 Ired. Law, 302; *Nelson v. Iverson*, 24 Ala. 9; *Armstrong v. Huffstutler*, 19 Ala. 51.

There must be a specification, however, sufficient to enable the witness to recall the facts.¹

§ 556. In some jurisdictions it is not considered requisite to ask a witness beforehand as to whether he had not stated differently;² in other cases it has been left to the discretion of the court.³

§ 557. At common law, as we have seen, when the statements are in writing, they must be first shown to the witness.⁴ Generally, however, the rule does not apply when the impeaching statements are found in depositions by the same witness in the same cause,⁵ though it has been held such impeaching depositions cannot be read unless the witness is first allowed the opportunity of explaining them.⁶ Parties, when appearing as witnesses, may be in like manner contradicted.⁷ How far a witness is discredited by proof of inconsistent statements, has been already noticed.⁸ It may be however observed generally that such inconsistency does not in itself destroy credibility, but that its effect is to be gauged by the circumstances of the case.⁹ On reëxamination the impeached witness may be asked as to the details of the alleged contradiction.¹⁰

§ 558. To make the impeaching statement admissible it must be a contradictory opposite of the statement made by the witness on trial. If the two statements are reconcilable, one cannot be received to contradict the other.¹¹ "It is not necessary,"

¹ *Pendleton v. Empire Co.* 19 N. Y. 13; *Joy v. State*, 14 Ind. 139. *Supra*, § 514.

² *U. S. v. White*, 5 Cranch C. C. 457; *Howland v. Conway*, 1 Abb. Adm. 281; *Ware v. Ware*, 8 Greenl. 42; *Wilkins v. Babbershall*, 32 Me. 184; *New Portland v. Kingfield*, 55 Me. 172; *Titus v. Ash*, 24 N. H. 319; *Cook v. Brown*, 34 N. H. 460; *Hedge v. Clapp*, 22 Conn. 262. See *Brown v. Bellows*, 4 Pick. 188; *Gould v. Norfolk Co.* 9 Cush. 338; *Com. v. Hawkins*, 3 Gray, 463.

³ See *Sharp v. Emmet*, 5 Whart. 288; *McAteer v. McMullen*, 2 Barr, 32; *Kay v. Fredrigal*, 3 Barr, 221; *State v. Hoyt*, 13 Minn. 132.

⁴ *Supra*, § 68.

⁵ *Downer v. Dana*, 19 Vt. 338; *Bryan v. Walton*, 14 Ga. 185; *Molyneaux v. Collier*, 30 Ga. 731; *Hughes v. Wilkinson*, 35 Ala. 453.

⁶ *Samuels v. Griffith*, 13 Iowa, 103; *Bradford v. Barclay*, 39 Ala. 33.

⁷ *Gibbs v. Linabury*, 22 Mich. 479. See *supra*, § 484.

⁸ *Supra*, § 412.

⁹ *Dunn v. People*, 29 N. Y. 523.

¹⁰ *State v. Winkley*, 14 N. H. 480.

¹¹ *Hall v. Young*, 37 N. H. 134; *City Bank v. Young*, 43 N. H. 457; *Hine v. Pomeroy*, 39 Vt. 211; *Starks v. Sikes*, 8 Gray, 609; *Cooley v. Norton*, 4 Cush. 93; *First Baptist Church v. Ins. Co.* 28 N. Y. 153. See *Travis v. Brown*,

however, "that the contradiction should be in terms; statements by the witness, inconsistent with his testimony upon material matters, may be proved against him."¹ Impeaching evidence is admissible, even though the witness, when cross-examined as to the contradicting expressions, should say he is uncertain whether he made them or not.²

§ 559. In order to avoid an interminable multiplication of issues, it is a settled rule of practice, that when a witness is cross-examined on a matter collateral to the issue, he cannot, as to his answer, be subsequently contradicted by the party putting the question.³ "The test of whether a fact inquired of in cross-examination is collateral is this, Would the cross-examining party be entitled to prove it as a part of his case, tending to establish his plea?"⁴ This limitation, however, only applies to answers on cross-examination. It does not affect answers to the examination in chief.⁵

§ 560. In England, by the old practice, in cases of conflict,

43 Penn. St. 9; *Cheek v. Wheatly*, 11 Humph. 556; *Hall v. Simmons*, 24 Tex. 227.

¹ *Appleton, C. J., State v. Kingsbury*, 58 Me. 241.

² *Nute v. Nute*, 41 N. H. 60; *People v. Jackson*, 3 Parker C. R. 590; *Gregg v. Jamison*, 55 Penn. St. 468; *Ray v. Bell*, 24 Ill. 444; *State v. Ostrander*, 18 Iowa, 435; though see *McVey v. Blair*, 7 Ind. 590.

³ *Spenceley v. De Willott*, 7 East, 108; *R. v. Watson*, 2 Stark. R. 149; *Baker v. Baker*, 3 Sw. & Tr. 213; *Tennant v. Hamilton*, 7 Cl. & F. 122; *U. S. v. Dickinson*, 2 McLean, 325; *U. S. v. White*, 5 Cranch C. C. 38; *Ware v. Ware*, 8 Me. 42; *State v. Kingsbury*, 58 Me. 239; *State v. Reed*, 60 Me. 550; *State v. Benner*, 64 Me. 267; *Tibbetts v. Flanders*, 18 N. H. 284; *Seavy v. Dearborn*, 19 N. H. 351; *State v. Thibean*, 30 Vt. 100; *Com. v. Buzzell*, 16 Pick. 153; *Com. v. Farrar*, 10 Gray, 6; *Davis v. Keyes*, 112 Mass. 436; *Kaler v. Ins. Co.* 120 Mass. 333; *Winton v. Meeker*, 25

Conn. 456; *Carpenter v. Ward*, 20 N. Y. 243; *Gandolfo v. Appleton*, 40 N. Y. 533; *Green v. Rice*, 33 N. Y. Sup. Ct. 292; *Rosenweig v. People*, 63 Barb. 634; *Griffith v. Eshelman*, 4 Watts, 51; *Schenley v. Com.* 36 Penn. St. 29; *McIntyre v. Young*, 6 Blackf. 496; *Fogleman v. State*, 32 Ind. 145; *Cokely v. State*, 4 Iowa, 477; *Patten v. People*, 18 Mich. 314; *State v. Staley*, 14 Minn. 105; *State v. Patterson*, 2 Ired. 346; *State v. Pully*, 63 N. C. 8; *Clark v. Clark*, 65 N. C. 655; *State v. Elliott*, 68 N. C. 124; *Wilkinson v. Davis*, 34 Ga. 549; *Dozier v. Joyce*, 8 Port. 303; *Rosenbaum v. State*, 33 Ala. 351; *People v. Devine*, 44 Cal. 452.

⁴ *Sharswood, J., Hildeburn v. Curran*, 65 Penn. St. 63; and see *Woodward v. Easton*, 118 Mass. 403. As to how far such contradiction may be extended at the discretion of the court, see *Powers v. Leach*, 26 Vt. 270.

⁵ *State v. Sargent*, 32 Maine, 429; *Hastings v. Livermore*, 15 Gray, 10; *Whitney v. Boston*, 98 Mass. 312.

the witnesses could be confronted; and on one remarkable occasion no less than four witnesses were for this purpose placed together in the box.¹ "This practice, which is still recognized in ecclesiastical courts and courts of probate, and which prevails largely in county courts, where it is often productive of highly useful results, has, for some unexplained reason, grown into comparative disuse at nisi prius. This is to be regretted; for the practice certainly affords an excellent opportunity of contrasting the demeanor of the opposing witnesses, and of thus testing the credit due to each; while it also furnishes the means of explaining away an apparent contradiction, or of rectifying a mistake, where both witnesses have intended to state nothing but the truth."²

§ 561. A witness's answers as to motives are not open to the criticism that has been applied to his answers as to prior misconduct. The latter open one or more distinct issues, and prejudice the witness, by putting him, without notice, on trial for other acts than that specifically in litigation. The former relate exclusively to the immediate issue, and concern topics as to which the party has notice to prepare. Hence it has been held that a witness may be asked whether he has not a strong bias or interest in the case, and if

¹ *White v. Smith*, Arm. M. & O. 171, per Brady, C. B.; *Casson v. O'Brien*, *Ibid.* 263, per Pennefather, C. J.; *Taylor's Ev.* § 1332.

² *Ibid.* Mr. Justice Cowen, in his note to *Ph. Ev.* vol. ii. p. 774, illustrates the utility of the practice by a case "in which a highly respectable witness, sought to be impeached through an out-of-door conversation, by another witness, who seemed very willing to bring him into contradiction, upon both being placed upon the stand, furnished such a distinction to the latter as corrected his memory, and led him in half a minute to acknowledge that he was wrong. The difference lay only in one word. The first witness had now sworn that he did not rely on a certain firm as being in good credit. It turned out that in his

former conversation he spoke of a partnership from which one name was soon afterward withdrawn, leaving him now to speak of the latter firm thus weakened by the withdrawal. In regard to the credit of the first firm, he had, in truth, been fully informed by letters. With respect to the last, he had no information. The sound in the title of the firm was so nearly alike that the ear would easily confound them; and had it not been for the colloquium thus brought on, an apparent contradiction would, doubtless, have been kept on foot, for various purposes, through a long trial. It involved an inquiry into a credit, which had been given to another on the fraudulent representations of the defendant." *Taylor's Ev.* § 1332.

he denies such interest or bias, that he may be contradicted by evidence of his own statements, or of other implicative acts. The same rule applies to questions as to quarrels between the witness and the party against whom he is called.¹ It is true that we have cases disputing this conclusion;² but it is hard to see how evidence which goes to the root of a witness's impartiality can be regarded as collateral to the issue.³

§ 562. It is competent, in order to discredit a witness, to offer evidence attacking his character for truth and veracity.⁴ Particular independent facts, though bearing on the question of veracity, cannot, however, be put in evidence for this purpose.⁵ Thus, evidence has been refused of declarations of a witness of his own want of religion;⁶ though it is held that it may be proved that a witness had de-

Witness's character for truth and veracity may be attacked.

¹ *R. v. Yervin*, 2 Camp. 638; *R. v. Martin*, 6 C. & P. 562; *Thomas v. David*, 7 C. & P. 350; *Queen's case*, 2 B. & B. 311; *Atty. Gen. v. Hitchcock*, 1 Exch. R. 102; *Swett v. Shumway*, 102 Mass. 365; *Davis v. Keyes*, 112 Mass. 436; *Beardsley v. Wildman*, 41 Conn. 515; *People v. Austin*, 1 Parker C. R. 154; *Gaines v. Com.* 14 Wright (Penn.) 327; *Lucas v. Flinn*, 35 Iowa, 9; *Geary v. People*, 22 Mich. 220.

² *Harrison v. Gordon*, 2 Lew. C. C. 150; *R. v. Holmes*, L. R. 1 C. C. R. 237; *Harris v. Tippet*, 2 Camp. 637; *State v. Patterson*, 2 Ired. 346. As to the materiality of bias and motive, see *supra*, § 408.

³ *Supra*, §§ 408, 544, 545.

⁴ *R. v. Rockwood*, 13 How. St. Tr. 210; *Carlos v. Brooks*, 10 Ves. 49; *Mawson v. Hartsink*, 4 Esp. 103; *R. v. Brown*, L. R. 1 C. C. 70; *U. S. v. Vansickle*, 2 McLean, 219; *U. S. v. White*, 5 Cranch C. C. 38; *Ordway v. Haynes*, 50 N. H. 159. As to mode of proving character, *supra*, §§ 48-9, 56. See *Hamilton v. People*, 29 Mich. 173.

⁵ *Supra*, § 49, 50; *R. v. Rockwood*, 13 How. St. Tr. 210; *Carlos v. Brooks*, 10 Ves. 49; *Penny v. Watts*, 2 De

Gex & Sm. 501; *U. S. v. Masters*, 4 Cranch C. C. 169; *U. S. v. Vansickle*, 2 McLean, 219; *Phillips v. Kingfield*, 19 Me. 375; *Shaw v. Emery*, 42 Me. 59; *State v. Bruce*, 24 Me. 71; *Spears v. Forrest*, 15 Vt. 435; *Crane v. Thayer*, 18 Vt. 162; *Com. v. Churchill*, 11 Mete. (Mass.) 538; *Root v. Hamilton*, 105 Mass. 22; *Bakeman v. Rose*, 18 Wend. 146; *Wehrkamp v. Willet*, 4 Abb. (N. Y.) App. 548; *Foster v. Newbrough*, 58 N. Y. 481; *Southworth v. Bennett*, 58 N. Y. 659; *Crichton v. People*, 6 Parker C. R. 363; *Wike v. Lightner*, 11 Serg. & R. 198; *Rixey v. Bayse*, 4 Leigh, 330; *Uhl v. Com.* 6 Grat. 706; *Barton v. Morphis*, 2 Dev. 520; *Clark v. Bailey*, 2 Strobb. Eq. 143; *Weathers v. Barksdale*, 30 Ga. 888; *Nugent v. State*, 18 Ala. 521; *Craig v. State*, 5 Oh. St. 605; *Frye v. Bank*, 11 Ill. 367; *Crabtree v. Kile*, 21 Ill. 180; *Walker v. State*, 6 Blackf. 1; *Long v. Morrison*, 14 Ind. 595; *Ketchingman v. State*, 6 Wise. 426; *Rudsdill v. Slingerland*, 18 Minn. 380; *Thurman v. Virgin*, 18 B. Mon. 785; *Taylor v. Com.* 3 Bush, 508; *Newman v. Mackin*, 21 Miss. 383.

⁶ *Halley v. Webster*, 21 Me. 461.

clared that he would swear to anything.¹ *A fortiori*, is general character for "badness," or "infamy," inadmissible.² Thus, it has been held inadmissible, in order to attack veracity, to prove the bad character of a female witness for chastity, or to show that she is a prostitute;³ or to prove habits of intemperance, which do not affect the perceptive or narrative powers.⁴

§ 563. The impeaching witness, it has been frequently ruled, must be asked, as a preliminary question, as to the impeached witness's general character or reputation for truth and veracity in the community in which he has lived.⁵ It is inadmissible to ask what character the impeached witness had in a neighborhood in which he was a non-resident;⁶ or at a period long prior to that of the trial.⁷ But

Questions to be confined to reputation for veracity.

¹ Newhal v. Wadhams, 1 Root, 504; Anonymous, 1 Hill (S. C.) 25.

² State v. Bruce, 11 Shepl. 71; Com. v. Churchill, 11 Mete. 538; State v. Sater, 8 Iowa, 420; Kilburn v. Muller, 22 Iowa, 498; State v. O'Neil, 4 Ired. 88; People v. Yslas, 27 Cal. 630; though see Carpenter v. Wall, 11 Ad. & El. 803; Sharp v. Scoging, Holt N. P. R. 541; Johnson v. People, 3 Hill (N. Y.), 178; Wright v. Paige, 36 Barb. 143; State v. Boswell, 2 Dev. L. 209; State v. Shields, 13 Mo. 236; State v. Breedon, 58 Mo. 507; Hume v. Scott, 3 A. K. Marsh. 261; Gilham v. State, 1 Head, 38.

³ Wilds v. Blanchard, 7 Vt. 141; Spears v. Forrest, 15 Vt. 435; Com. v. Churchill, 11 Mete. 530, overruling Com. v. Murphy, 14 Mass. 387; Jackson v. Lewis, 13 Johns. R. 504; Bakeman v. Rose, 14 Wend. 105; Gilchrist v. McKee, 4 Watts, 380; Kilburn v. Mullen, 22 Iowa, 498; People v. Yslas, 27 Cal. 630. See Indianapolis R. R. v. Anthony, 43 Ind. 183.

⁴ Thayer v. Boyle, 30 Me. 375; Hoitt v. Moulton, 21 N. H. 586. See supra, §§ 48-56.

⁵ Teese v. Huntingdon, 23 How. 2; U. S. v. Vansickle, 2 McLean, 219;

Knode v. Williamson, 17 Wall. 586; State v. Randolph, 24 Conn. 363; People v. Mather, 4 Wend. 229; Atwood v. Impson, 20 N. J. Eq. 150; Bogle v. Kreitzer, 46 Penn. St. 465; Bucklin v. State, 20 Ohio, 18; French v. Millard, 2 Oh. St. 44; Crabtree v. Hagenbauch, 25 Ill. 233; Simmons v. Holster, 13 Minn. 249; Keator v. People, 32 Mich. 484; Boswell v. Blackman, 12 Ga. 591; Stokes v. State, 18 Ga. 17; Smithwick v. Evans, 24 Ga. 461; Pleasant v. State, 15 Ark. 624. See Bates v. Barber, 4 Cush. 107; Com. v. Lawler, 12 Allen, 585; Graham v. Chrystal, 2 Abb. (N. Y.) App. 263.

⁶ Boynton v. Kellogg, 3 Mass. 192; Conkey v. People, 5 Parker C. R. 31; Wike v. Lightner, 11 Serg. & R. 198; Griffin v. State, 14 Oh. St. 55; Chance v. R. R. 32 Ind. 472; Webber v. Hanke, 4 Mich. 198; Campbell v. State, 23 Ala. 44. See Sleeper v. Van Middlesworth, 4 Denio, 431; Rathbun v. Ross, 46 Barb. 127; Holmes v. Stateler, 17 Ill. 453. See supra, § 49.

⁷ State v. Howard, 9 N. H. 485; Rogers v. Lewis, 19 Ind. 405; Aurora v. Cobb, 21 Ind. 492. See Com. v. Billings, 97 Mass. 405; People v.

evidence of bad reputation for veracity four years previous to the trial is held admissible to impeach a witness who had no fixed domicile, and had been out of the state over a year of the time, and whose residence at the place of such reputation was as long as at any other.¹ A stranger sent into a community to learn the character of a witness is not competent to testify as to such character.²

§ 564. "Character," in the sense in which it is used in the questions so authorized, is to be viewed as convertible with reputation.³ It is true that "in many cases, it has been said, the regular mode of examining is to inquire whether the witness knows the general character of the person whom it is intended to impeach; but in all such cases the word 'character' is used as synonymous with reputation. What is wanted is the common opinion, that in which there is general concurrence; in other words, general reputation or character attributed. That is presumed to be indicative of actual character, and hence it is regarded as of importance when the credibility of a witness is in question."⁴ But while particular facts are inadmissible on this issue, general reputation only being the question; on cross-examination, as we will see, a witness attacking character may be tested as to details.⁵

§ 565. Unless the court is satisfied that the impeaching witness has adequate means of knowledge, he will not be admitted;⁶ though this is in Massachusetts left to the discretion of the court.⁷ It is generally sufficient if the witness says he can speak of the general sense of such of the community as are acquainted with the impeached witness, or among whom the impeached witness moves.⁸ Supposing the impeaching witness be shown to be com-

Abbott, 19 Wend. 192, as indicating limits as to time.

¹ Keator v. People, 32 Mich. 481.

² Reid v. Reid, 17 N. J. Eq. 191.

³ Supra, § 49.

⁴ Strong, J., Knode v. Williamson, 17 Wall. 588. See other cases supra, § 49.

⁵ Infra, § 565. See, particularly, supra, § 49, to the position that disparaging facts cannot be introduced.

⁶ King v. Rackman, 20 N. J. Eq.

316; Kelley v. Proctor, 41 N. H. 139; State v. Parks, 3 Ired. L. 266; State v. Speight, 69 N. C. 72.

⁷ Wetherbee v. Norris, 103 Mass. 565. Infra, § 565.

⁸ Kimmel v. Kimmel, 3 Serg. & R. 336; Crabtree v. Kile, 21 Ill. 280; Hadjo v. Gooden, 13 Ala. 718; Dave v. State, 22 Ala. 23; Elam v. State, 25 Ala. 53; Ward v. State, 28 Ala. 53.

petent to express an opinion, he may then be asked whether he would believe the impeached witness on his oath.¹ But it has

¹ *R. v. Brown*, 10 Cox C. C. 453; *S. C. L. R.* 1 C. C. 70; *Mawson v. Hartsink*, 4 Esp. 103; *Titus v. Ash*, 4 Foster, 319; *Stevens v. Irwin*, 12 Cal. 306; *People v. Mather*, 4 Wendell, 457; *People v. Rector*, 19 Wendell, 569; *Bogle v. Kreitzer*, 46 Penn. St. 465; *Lyman v. Philadelphia*, 56 Penn. St. 438; *Knight v. House*, 29 Md. 194; *Eason v. Chapman*, 21 Ill. 33; *Hamilton v. People*, 29 Mich. 185; *Keator v. People*, 32 Mich. 484; *Wilson v. State*, 3 Wisc. 798; *Stevens v. Irwin*, 12 Cal. 306; *Stokes v. State*, 18 Ga. 17; *McCutehen v. McCutehen*, 9 Port. 650; *Mobley v. Hamit*, 1 A. K. Marsh. 590; *Henderson v. Hayne*, 2 Mete. (Ky.) 342; *Ford v. Ford*, 7 Humph. 92; *Hooper v. Moore*, 3 Jones (N. C.) L. 428. See, as questioning this course, *Phillips v. Kingfield*, 1 Applet. 375; *Gass v. Stinson*, 2 Sumn. 610; *Kimmel v. Kimmel*, 3 S. & R. 336; *Wike v. Lightner*, 11 S. & R. 198; *People v. Tyler*, 35 Cal. 553.

The right to put such a question is disputed by Mr. Greenleaf; but is vindicated as follows by a learned Michigan judge:—

“The purpose of any inquiry into the character of a witness is to enable the jury to determine whether he is to be believed on oath. Evidence of his reputation would be irrelevant for any other purpose. And a reputation which would not affect a witness so far as to touch his credibility under oath, could have no influence. The English text-books and authorities have always, and without exception, required the testimony to be given directly on this issue. The questions put to the impeaching and supporting witnesses relate, first, to their knowledge of the reputation for

truth and veracity of the assailed witness; and, second, whether, from that reputation, they would believe him under oath. . . . A very recent decision is found in *Queen v. Brown & Hedley*, L. R. 1 C. C. R. 70. The reason given is that, unless the impeaching witness is held to showing the extent to which an evil reputation has affected a person's credit, the jury cannot accurately tell what the witness means to express by stating that such reputation is good or bad, and can have no guide in weighing his testimony. And since it has become settled that they are not bound to disregard a witness entirely, even if he falsifies in some matters, it becomes still more important to know the extent to which the opinion in his neighborhood has touched him. It has also been commonly observed that impeaching questions as to character are often misunderstood, and witnesses, in spite of caution, base their answer on bad character generally, which may or may not be of such nature as to impair confidence in testimony. When the question of credit under oath is distinctly presented, the answers will be more cautious.

“Until Mr. Greenleaf allowed a statement to creep into his work on Evidence, to the effect that the American authorities disfavored the English rule, it was never very seriously questioned. See 1 Greenl. Ev. § 461. It is a little remarkable that if the cases referred to sustain this idea, not one contained a decision upon the question, and only one contained more than a passing *dictum* not in any way called for. *Phillips v. Kingfield*, 1 Appleton's (Me.) R. 375. The authorities referred to in that case con-

been held not essential, in order to throw discredit on the impeached witness, that the impeaching witness should state

tained no such decision, and the court, after reasoning out the matter somewhat carefully, declared the question was not presented by the record for decision. The American editors of Phillipps and Starkie do not appear to have discovered any such conflict, and do not allude to it. They do, however, as many decisions do, refer to the kind of reputation which should be shown, and whether of veracity or of other qualities. In *Webber v. Hanke*, 4 Mich. R. 198, no question came up on the record except as to the species of reputation, and the neighborhood and the time of its existence; and what was said further was not in the case, and cannot properly dispose of the matter. The objection alleged to such an answer by a witness is, that it enables the witness to substitute his opinion for that of the jury. But this is a fallacious objection. The jury, if they do not act from personal knowledge, cannot understand the matter at all without knowing the witness's opinion, and the ground on which it is based. It is the same sort of difficulty which arises in regard to insanity, to disposition, or temper, to distances and velocities, and many other subjects where a witness is only required to show his means of information, and then state his conclusions, or belief based on those means. If six witnesses are merely allowed to state that a man's reputation is bad, and as many say it is good, without being questioned further, the jury cannot be said to know much about it. Nor would any cross-examination be worth much unless it aided them in finding out just how far each witness regarded it as tainted.

"So far as the reports show, the

American decisions, instead of shaking the English doctrine, are very decidedly in favor of it, and have so held upon careful and repeated examination, and we have not been referred to, nor have we found any considerable conflict. See, in New York, *People v. Mather*, 4 Wend. R. 229 (which was the view of Judge Oakley, no opinion being given by his associate); *People v. Rector*, 19 Wend. R. 569; *People v. Davis*, 21 Wend. 309; in New Hampshire, *Titus v. Ash*, 4 Foster, 319; in Pennsylvania, *Bogle's Ex'rs v. Kreitzer*, 46 Penn. St. 465; *Lyman v. Philadelphia*, 56 Penn. St. 488; in Maryland, *Knight v. House*, 29 Md. 194; in California, *Stevens v. Irwin*, 12 Cal. 306; *People v. Tyler*, 35 Cal. 553; in Illinois, *Eason v. Chapman*, 21 Ill. 33; in Wisconsin, *Wilson v. State*, 3 Wise. 798; in Georgia, *Stokes v. State*, 18 Ga. 17; *Taylor v. Smith*, 16 Ga. 7; in Tennessee, *Ford v. Ford*, 7 Humph. 92; in Alabama, *McCutchen v. McCutchen*, 9 Port. 650; in Kentucky, *Mobley v. Hamit*, 1 A. K. Marsh. 590; also in Judge McLean's Circuit, in *U. S. v. Vansickle*, 2 McLean, 219.

"Mr. Greenleaf himself intimates that it might be a proper inquiry on *cross-examination*. We think the inquiry proper, when properly confined and guarded, and not left to depend on any basis but the reputation for truth and veracity. And we also think that the cross-examination on impeaching or sustaining testimony should be allowed to be full and searching." *Campbell, J., Hamilton v. People*, 29 Mich. R. 185.

The Massachusetts practice in this respect may be thus stated: "The ruling of the presiding judge, that each

that he would not believe the impeached witness on his oath.¹ The impeaching witness, who has sworn as to the bad character of the impeached witness for truth, may be asked on cross-examination as to who he had heard thus disparage the impeached witness;² and as to what other grounds he had for his

of the witnesses called to impeach the plaintiff should be first asked the question, 'Do you know the reputation of the plaintiff for truth and veracity?' is not the subject of exceptions. The practice upon this subject differs in different courts. In this state, no practice is established as a rule of law, but it is within the discretion of the presiding judge to require the preliminary question above stated to be asked of each witness, if he shall deem that the interests of justice require it. The same principle is applicable to the examination of witnesses upon other subjects. It often occurs, in the trial of cases, that the judge is called upon to inquire of a witness whether he has knowledge of the matter of which he is called to testify. If it appears to be doubtful whether the witness understands and appreciates his duty to testify only to what he knows of his own knowledge; or if, for any reason, there is danger that he may testify to hearsay; it is the right, and may be the duty, of the presiding judge to inquire of him whether he has knowledge of the matter as to which he is asked to testify; and the party calling the witness would not be thereby aggrieved, and no exceptions would lie. So, in the examination of impeaching witnesses, if the presiding judge sees that there is danger that the witness, in answer to the usual question, 'What is his general reputation for truth and veracity?' may give incompetent testimony, either because he fails to understand the exact character of the

question, or for any other reason, he may require the witness first to be asked whether he knows what that reputation is. Whether the circumstances of this case required the preliminary question to be put, was a matter within the judicial discretion of the presiding judge, and cannot be revised on exceptions.

"The case at bar is clearly distinguishable from the case of *Bates v. Barber*, 4 Cush. 107. In that case, the presiding judge directed that the witnesses must be first examined as to their knowledge and means of knowledge of the character of the witness attempted to be impeached, and upon such examination assumed the right to decide whether the witness offered had sufficient knowledge to qualify him to testify. In this case, the purpose and effect of the preliminary question appears to have been merely to ascertain whether the witness had any knowledge of the general reputation of the impeached witness, and not to inquire into the extent or means of such knowledge. The only witness rejected was rejected because he did not appear to have any knowledge; not because the amount of his knowledge was not satisfactory to the court." *Morton, J., Wetherbee v. Norris*, 103 Mass. 566.

¹ *People v. Tyler*, 35 Cal. 353.

² *Bates v. Barber*, 4 Cush. 197; *Weeks v. Hull*, 19 Conn. 376; *Lower v. Winters*, 7 Cow. 263; *People v. Annis*, 13 Mich. 511; *State v. Perkins*, 66 N. C. 126. *Infra*, § 568.

conclusion.¹ The court may, at its discretion, limit the number of impeaching witnesses to be examined.²

§ 566. As we have seen,³ it is competent, ground being first duly laid by cross-examination, to impeach a witness by showing his bias. For this purpose it is admissible Bias may be shown. to prove near relationship, sympathy, hostilities as evidenced by a quarrel, and prejudice as to the particular case, so far as is exhibited by declarations and acts.⁴ When the object is to prove hostile declarations or acts, the witness must first be cross-examined as to such declarations or acts, so that he may have an opportunity for explanation.⁵ A witness cannot, it is said, be asked if he is not prejudiced against a particular party. He must be asked as to particular facts or conditions.⁶ So a witness may be

¹ *Pierce v. Newton*, 13 Gray, 528; *Titus v. Ash*, 24 N. H. 319; *Bullard v. Lambert*, 40 Ala. 204.

² *Bunnell v. Butler*, 23 Conn. 65; *Bissell v. Cornell*, 24 Wend. 354; *Gray v. St. John*, 35 Ill. 222; *Cox v. Pruitt*, 25 Ind. 90.

³ *Supra*, § 408.

⁴ *Davis v. Roby*, 64 Me. 430; *Drew v. Wood*, 26 N. H. 363; *Carr v. Moore*, 41 N. H. 131; *Hutchinson v. Wheeler*, 35 Vt. 330; *Long v. Lamkin*, 9 Cush. 361; *Day v. Stickney*, 14 Allen, 255; *Swett v. Shumway*, 102 Mass. 365; *Atwood v. Welton*, 7 Conn. 66; *Daggett v. Tallman*, 8 Conn. 168; *People v. Rector*, 19 Wend. 569; *Howell v. Ashmore*, 22 N. J. L. 261; *Magchan v. Thompson*, 9 Watts & S. 54; *Gangwere's Est.* 14 Penn. St. 417; *Batdorff v. Bank*, 61 Penn. St. 183; *Ray v. Bell*, 24 Ill. 444; *First Nat. Bk. v. Haight*, 55 Ill. 191; *Bersch v. State*, 13 Ind. 434; *Conkey v. Post*, 7 Wise. 131; *State v. Oscar*, 7 Jones (N. C.) L. 305; *Bishop v. State*, 9 Ga. 121; *Martin v. Martin*, 25 Ala. 201; *Head v. State*, 44 Miss. 731; *State v. Montgomery*, 28 Mo. 594; *Ward v. Valentine*, 7 La. An. 184; *Tardif v. Baudoin*, 9 La. An. 127; *Cornelius v. State*, 12 Ark. 782.

⁵ *Day v. Stickney*, 14 Allen, 255; *Edwards v. Sullivan*, 8 Ired. L. 302; *McHugh v. State*, 31 Ala. 317; though see *New Portland v. Kingfield*, 55 Me. 172; *Martin v. Barnes*, 7 Wise. 239. As to the effect of interest on credibility, see *supra*, § 408; *Carver v. Louthain*, 38 Ind. 530; *Mathilde v. Levy*, 24 La. An. 421.

⁶ *Cornelius v. State*, 12 Ark. 782.

"A witness may be impeached by showing a bias or prejudice, or gross misconduct in reference to the cause in which his testimony is given. *Mrs. Smith* was a witness. She was impeached by proof from her own lips that she knew nothing about the case but what her husband had told her, and that he had told her the story she must tell, with a caution, that she must tell the same story twice alike, or she would spoil all. The authorities all show that a witness may be thus impeached. *Chapman v. Coffin*, 14 Gray, 454; *Day v. Stickney*, 14 Allen, 255; *Swett v. Shumway*, 102 Mass. 365; *New Portland v. Kingfield*, 55 Me. 172. Certainly, a statement, that she knew nothing about the case except what was told her, is a contradiction of any statement as to her knowl-

impeached by proof that he stated, after having testified, that he had been hired so to do.¹

§ 567. We have already noticed² that in most states a conviction of an infamous crime no longer renders a person incompetent as a witness. The record of conviction, however, by the law of several jurisdictions, may be put in evidence in order to impeach credibility.³ Under the Massachusetts General Statutes the conviction of any crime may be shown for this purpose.⁴ Such conviction, as we have already seen, must be proved by record;⁵ though it is admissible to ask a witness whether he has not been in the penitentiary.⁶ A verdict of guilty, without judgment, is not a "conviction."⁷ But a pardon does not preclude such conviction from being put in evidence.⁸

edge." Appleton, C. J., *Davis v. Roby*, 64 Me. 430.

¹ *McGinnis v. Grant*, 42 Conn. 77.

"To show bias on behalf of the witness was the right of the defendant, if he could. In *Cameron v. Montgomery*, 13 S. & R. 128, it was held that the party against whom a witness has testified, may show anything which might in the slightest degree affect his credit, and the judgment in that case was reversed, because the court below refused to allow the witness to be asked, 'whether the plaintiff did not buy (the witness's) property at his (the witness's) instance?' 'It was a circumstance,' said Tilghman, C. J., 'which might show that the witness was under obligation to him, and this might have had some effect on his evidence, by exhibiting a bias.' We cited and approved this rule in *Ott v. Heighton*, 6 Casey, 451; and reversed in that case because it had been disregarded on the trial below." *Thompson, C. J., Batdorff v. Bank*, 61 Penn. St. 183.

² *Supra*, § 397.

³ *Com. v. Knapp*, 9 Pick. 49; *Com. v. Gorham*, 99 Mass. 420; *Real*, in re, 55 Barb. 186; *Donahue v. People*, 56 N. J. 208. See *Dickinson v. Dustin*,

21 Mich. 561; *Glenn v. Clove*, 42 Ind. 62; *Jefferson R. R. v. Riley*, 39 Ind. 368; *Johnson v. State*, 48 Ga. 116.

⁴ *Com. v. Hall*, 4 Allen, 305.

⁵ *Supra*, §§ 63, 64, 541; *infra*, § 991.

⁶ *Supra*, § 64; *infra*, § 991; *Real v. People*, 42 N. Y. 270, cited *supra*, § 541.

⁷ See cases cited *supra*, § 397; *infra*, § 824.

⁸ The authorities to this effect are well grouped in the following opinion:—

"If the king pardon these offenders, they are thereby rendered competent witnesses, though their credit is to be still left to the jury, for the king's pardon takes away *poenam et culpam in foro humano* . . . but yet it makes not the man always an honest man." 2 Hale P. C. 278; *King v. Castlemain*, 7 How. St. Tr. 1109, 1110; *King v. Rookwood*, 13 How. St. Tr. 185, 186; 1 Stark. Ev. 99; *Peake Ev.* 132; *McNally Ev.* 232, 234; 1 Gilbert Ev. (by Lofft, ed. of 1791), 260; 1 Phillipps Ev. (old ed.) 29; 1 Gr. Ev. § 377; 2 Saund. Pl. & Ev. 1275; 1 Arch. Crim. Pr. &

XII. ATTACKING AND SUSTAINING IMPEACHING WITNESS.

§ 568. The character of an impeaching witness for truth and veracity may be itself attacked,¹ and may be sustained by countervailing proof.² The impeaching witness's opportunities of observation, or prejudice, may be assailed on cross-examination;³ and he may be required, as we

Impeaching witness may be attacked and sustained.

Pl. 155; 1 Arch. N. P. 29; Bac. Abr. Pardon (H.); 3 Wooddeson, Lectures on Laws of Eng. 284; Wharton Cr. L. (6th ed.) § 765; 1 Bishop Cr. L. § 763; 2 Hargrave Juridical Arguments, 221, 233, 260, 267; 2 Russell on Cr. 975, note; Roseoe Cr. Ev. 137, note; 2 Am. L. Reg. N. S. 488; U. S. v. Jones, 2 Wheeler Cr. Cases, 451; Baum v. Clause, 5 Hill, 196; Carpenter v. Nixon, 5 Hill, 260; Newcomb v. Griswold, 24 N. Y. 300; Gardner v. Bartholomew, 40 Barb. 325; Com. v. Green, 17 Mass. 515, 550, 551; Com. v. Rogers (Pamph. Rep.), 39, 148, 179, 180, 231, 249, 256, 271; Hoffman v. Coster, 2 Whar. 453, 462; Howser v. Com. 51 Penn. St. 332, 340; Anglea v. Com. 10 Grant, 696, 698, 699, 703, 704; 2 Hume Cr. L. 344; Glassford Ev. 413.

"A person convicted of an offence known in law as infamous, is incapacitated to be a witness, because, when his guilt is established by conviction, his general character for truth is shown to be so bad that his testimony would be useless or dangerous. 1 Gr. Ev. § 372; 1 Stark. Ev. 94. That is the theory of the common law. The conviction is an impeachment and condemnation of his general character for truth. A pardon is not presumed to be granted on the ground of innocence or total reformation. Cook v. Middlesex, 2 Dutcher, 326, 331, 333; 4 Bl. Com. 397, 400; 3 Inst. 233, 238; 2 Hawk. P. C. ch. 37, § 8; Com. v. Halloway, 44 Penn. 210. It removes

the disability, but does not change the common law principle that the conviction of an infamous offence is evidence of bad character for truth. The general character of a person for truth, bad enough to destroy his competency as a witness, must be bad enough to affect his credibility when his competency is restored by the executive or legislative branch of the government.

"If the party against whom an infamous person is offered as a witness had the election of using the conviction as a ground of exclusion, or of an attack upon the credit of the witness, the testimony of the witness might be warped by the fear of impeachment and the hope of avoiding it; and that may be a sufficient reason for not allowing such election.

"When the character of a pardoned witness is impeached by the record of his conviction, it would seem that his character may be sustained by appropriate evidence." Doe, J., Curtis v. Coehran, 50 N. H. 244.

¹ Long v. Lamkin, 9 Cush. 361; Starks v. People, 5 Denio, 106; State v. Brant, 14 Iowa, 180; State v. Moore, 25 Iowa, 128; State v. Cherry, 63 N. C. 493.

² Lemons v. State, 4 W. Va. 755.

³ Mawson v. Hartsink, 4 Esp. 103; Phillips v. Kingfield, 1 Appleton, 375; Long v. Lamkin, 9 Cush. 361; State v. Howard, 9 N. H. 485; Weeks v. Hull, 19 Conn. 376; Stewart v. People, 23 Mich. 63; Arnold v. Nye, 23 Mich. 286; Durham v. State, 45 Ga. 516.

have seen,¹ to specify the persons who have spoken disparagingly of the impeached witness.²

XIII. SUSTAINING IMPEACHED WITNESS.

✓ § 569. When a witness's character for truth and veracity has been impeached, the party calling him may sustain him by calling witnesses to show that his character for truth and veracity is good, and that the sustaining witnesses would believe him on his oath.³ The inquiries, in such case, may range over the witness's whole prior history in other places.⁴ Such rebutting evidence is made admissible by the mere fact that the impeaching party examines an impeaching witness as to the impeached witness's character for truth, though the impeaching witness answers favorably.⁵ It is further held that such evidence may be admitted on particular discrediting facts being developed against the witness on his cross-examination,⁶ especially when he is in the situation of a stranger, testifying to isolated facts.⁷ *A fortiori* is this the case when the opposing party introduces, as part of his case, evidence directly reflecting on the veracity of the witness.⁸ Thus, a witness's character is so far impeached by putting in evidence his conviction of a felony, that evidence is admissible of his good reputation for truth.⁹ A mere conflict of testimony, however, will not justify introduction

¹ *Supra*, § 565.

² *Weeks v. Hull*, 19 Conn. 376; *Lower v. Winters*, 7 Cow. 263; *State v. Perkins*, 66 N. C. 126.

³ *R. v. Murphy*, 19 How. St. Tr. 724; *R. v. Clarke*, 2 Stark. R. 241; *Anglesea v. Anglesea*, 17 How. St. Tr. 1340; *Com. v. Ingraham*, 7 Gray, 46; *Troup v. Sherwood*, 3 Johns. Ch. 558; *Frazier v. People*, 54 Barb. 306; *People v. Davis*, 21 Wend. 309; *Lyman v. Philadelphia*, 56 Penn. St. 488; *Bucklin v. State*, 20 Oh. 18; *Lemons v. State*, 4 W. Va. 755; *Cook v. Hunt*, 24 Ill. 535; *Clark v. Bond*, 29 Ind. 555; *Harris v. State*, 30 Ind. 131; *Clem v. State*, 33 Ind. 419; *Taylor v. Smith*, 16 Ga. 7; *McCutchen v. McCutchen*, 9 Port. 350; *Hadjo v. Gooden*, 13 Ala. 718; *State v. Cherry*,

63 N. C. 493; *Glaze v. Whitley*, 5 Oregon, 164.

⁴ *Burrell v. State*, 18 Tex. 713; *Morss v. Palmer*, 15 Penn. St. 51; *Stratton v. State*, 45 Ind. 468.

⁵ *Com. v. Ingraham*, 7 Gray, 46.

⁶ See *Harrington v. Lincoln*, 4 Gray, 563; *People v. Rector*, 19 Wend. 569; *Lewis v. State*, 35 Ala. 380; *People v. Ah Fat*, 48 Cal. 62.

⁷ *Merriam v. R. R.* 20 Conn. 354. See *Brown v. Mooers*, 6 Gray, 451.

⁸ *Prentiss v. Roberts*, 49 Me. 127; *Isler v. Dewey*, 71 N. C. 14.

⁹ 2 Phil. Ev. (5th Am. ed.) 95; *State v. Roe*, 12 Vt. 111; *Paine v. Tilden*, 20 Vt. 554. See, however, *Doe v. Harris*, 7 C. & P. 330; *People v. Amanacus*, 50 Cal. 233.

of evidence thus to back up the witnesses thus conflicting.¹ Nor can such testimony be received, so it has sometimes been ruled, merely upon proof of prior conflicting statements of the witness.² Nor, after a record of a conviction has been introduced in order to discredit a witness, is it admissible to sustain him by evidence of his innocence of the offence of which he was convicted,³ or of general good character, as distinguished from reputation for truth.⁴ If it should appear that he was *acquitted* on a criminal trial, exculpatory evidence is, as a rule, inadmissible.⁵

When a witness has been impeached on his cross-examination, it has been held admissible to sustain him by letters to him from the adverse party, expressive of high esteem.⁶

The witness may be recalled to substantiate his own testimony.⁷

§ 570. When a witness is assailed on the ground that he narrated the facts differently on former occasions, it is ordinarily incompetent to sustain him by proof that on other occasions his statements were in harmony with those made on the trial.⁸ Thus, the declarations of a

But not
ordinarily
by proof of
former consistent
statements.

¹ *Durham v. Beaumont*, 1 Camp. 207; *Leonori v. Bishop*, 4 Duer, 420; *Starks v. People*, 5 Denio, 106; *Rogers v. Moore*, 10 Conn. 13; *Braddee v. Brownfield*, 9 Watts, 124; *Wertz v. May*, 21 Penn. St. 274; *Vernon v. Tucker*, 30 Md. 456; *Pruitt v. Cox*, 21 Ind. 15; *Johnson v. State*, 21 Ind. 329. See, however, *People v. Schweitzer*, 23 Mich. 301; *Davis v. State*, 38 Md. 15, 50; *Wade v. Thayer*, 40 Cal. 478.

² *Brown v. Mooers*, 6 Gray, 451; *Frost v. McCargar*, 29 Barb. 617; *Stamper v. Griffin*, 12 Ga. 450; *Newton v. Jackson*, 23 Ala. 335. See, however, *Paine v. Tilden*, 20 Vt. 554; *Sweet v. Sherman*, 21 Vt. 23; *Clark v. Bond*, 29 Ind. 555; *Isler v. Dewey*, 71 N. C. 14; *Hadjo v. Gooden*, 13 Ala. 718. See *Russell v. Coffin*, 8 Pick. 143.

³ *Gardner v. Bartholomew*, 40 Barb. 325.

⁴ *Heywood v. Reed*, 4 Gray, 574; *People v. Gay*, 7 N. Y. 378.

⁵ *Harrington v. Lincoln*, 4 Gray, 63.

⁶ *Stacey v. Graham*, 14 N. Y. 492.

⁷ *State v. George*, 8 Ired. L. 324.

⁸ *R. v. Parker*, 3 Dougl. 242; *Berkeley Peerage case*, cited 2 Ph. Ev. 445; *Ellicott v. Pearl*, 10 Pet. 412; *Conrad v. Griffey*, 11 How. 480; *State v. Holmes*, 1 Cliff. 98; *Ellicott v. Pearl*, 1 McLean, 206; *Ware v. Ware*, 8 Greenleaf, 42; *State v. Kingsbury*, 58 Me. 238; *Judd v. Brentwood*, 46 N. H. 430; *Munson v. Hastings*, 12 Vt. 348; *Deshon v. Ins. Co.* 11 Mete. (Mass.) 199; *Com. v. Jenkins*, 10 Gray, 485; *Robb v. Hackley*, 23 Wend. 50; *Dudley v. Bolles*, 24 Wend. 465; *Butler v. Truslow*, 11 Barb. 404; *Smith v. Stickney*, 17 Barb. 489; *Com. v. Carey*, 2 Brewst. 404; *State v. Thomas*, 3 Strobb. 269; *Nichols v. Stewart*, 20 Ala. 358; *Kiney v. Vallandigham*, 9 Mo. 817; *Quecener v. Morrow*, 1 Coldw. 123.

complainant in bastardy, whether made before or after her formal accusation upon oath, as to the paternity of her child, have been held inadmissible in evidence, when offered by her, either to show constancy or strengthen her credit; since they have no tendency to do either. They are no proof, such are the reasons, that entirely different statements may not have been made at other times, and are therefore no evidence of constancy in the accusation; and if her sworn statements are of doubtful credibility, those made without the sanction of an oath, or its equivalent, cannot corroborate them.¹ On the other hand, where the opposing case is that the witness testified under corrupt motives, or where the impeaching evidence goes to charge the witness with a recent fabrication of his testimony, it is but proper that such evidence should be rebutted.² It has consequently been ruled that statements made by a witness corroborating his evidence upon the trial, such statements being uttered soon after the transaction in litigation, and at a time when the witness could not have been subjected to any disturbing influences, are competent when proof has been offered to impeach him by showing that he had recently fabricated the narrative, or that he testified corruptly.³

¹ *Sidelinger v. Bucklin*, 64 Me. 371.

² *Taylor's Ev.* § 1330; *Henderson v. Jones*, 10 Serg. & R. 410; *Cooke v. Curtis*, 6 Har. & J. 86; *Stolp v. Blair*, 68 Ill. 543; *Coffin v. Anderson*, 4 Blackf. 395; *Daily v. State*, 28 Ind. 285; *Clark v. Bond*, 29 Ind. 555; *State v. Vincent*, 24 Iowa, 570; *State v. George*, 8 Ired. (L.) 324; *State v. Dove*, 10 Ired. (L.) 469; *March v. Harrell*, 1 Jones (L.) 329; *Lyles v. Lyles*, 1 Hill Ch. (S. C.) 76; *People v. Doyell*, 48 Cal. 85.

³ *French v. Merrill*, 6 N. H. 465; *Hotchkiss v. Ins. Co.* 5 Hun (N. Y.), 91; *Com. v. Wilson*, 1 Gray, 83. See *Dossett v. Miller*, 3 Sneed, 72; *Jackson v. Etz*, 5 Cow. 314; *State v. Dennin*, 32 Vt. 158. See *Maitland v. Bank*, 40 Md. 540; and *Deshon v. Ins. Co.* 11 Mete. 199.

"This court, in *Gates v. The Peo-*

ple, 14 Ill. 434, recognized the existence of a conflict of authority upon the question whether the former declarations of a witness, whose credibility is attacked, may be given in evidence to corroborate his testimony, but did not find it necessary in that case to determine in regard to the general rule, as that case came within one of the admitted exceptions to the rule of exclusion.

"We find the decided weight of authority to be, that proof of declarations made by a witness out of court, in corroboration of testimony given by him on the trial of a cause is, as a general rule, inadmissible, even after the witness has been impeached or discredited; and we are satisfied with the correctness of the rule. The following may be referred among the authorities sustaining such rule. 2 Phil.

§ 571. Ordinarily a party should introduce successively, and before he closes, all the evidence he has to sustain the essential averments of his case. It may happen, however, that one of his material witnesses may be unexpectedly attacked, and the case be made to depend upon the veracity of such witness. In such case it is admissible not merely to sustain the character of the witness when impeached, but to introduce, at the discretion of the court, evidence to corroborate the witness's statements. The exercise of this discretion is also sometimes prompted by a due regard for time and expense. A party may have a hundred witnesses to prove a particular point; but if the point should seem uncontested, he may properly content himself with calling one. It would be a hard measure to prohibit him from subsequently calling other witnesses, under such circumstances, to sustain the witness first called.¹ The point of such corroboration, however, must be material.²

Witness
may be
corroborat-
ed at dis-
cretion of
court.

Ev. 5th ed. 973, marginal; 1 Stark. Ev. 147; 1 Greenl. Ev. § 469; Robb v. Hackley, 23 Wend. 50; Gibbs v. Linsley, 13 Verm. 208; Ellicott v. Pearl, 10 Pet. 412; Conrad v. Griffey, 11 How. 480. A collection of cases upon the subject, on either side, will be found in the notes to 2 Phillips, by Cowen & Hill, 979, marginal, and in the case cited from 11 Howard.

"In some places, as in England and New York, the rule has been adopted in the place of a prior contrary one. As recognized in *Gates v. The People*, supra, the authorities agree that the former statements may, in some instances, be introduced for the purpose of sustaining his testimony; as, where he is charged with testifying under the influence of some motive prompting him to make a false statement, it may be shown that he made similar statements at a time when the imputed motive did not exist, or when motives of interest would have induced him to make a different statement of facts. So, in contradiction of evidence tend-

ing to show that the witness's account of the transaction was a fabrication of a recent date, it may be shown that he gave a similar account before its effects and operation could be foreseen. In some cases the admission of the confirmatory statement has been confined to the sole case of an impeachment by a contradictory statement of the witness; and again, such confirmatory statements have been held to be especially not admissible, if they were made subsequent to the contradictions proved on the other side, as in *Ellicott v. Pearl*, supra, and *Conrad v. Griffey*, supra." Sheldon, J., *Stolp v. Blair*, 68 Ill. 543.

¹ *Boston R. R. v. Dana*, 1 Gray, 83; *Richardson v. Stewart*, 4 Binn. 198; *Losee v. Mathews*, 61 N. Y. 627; *Wickenkamp v. Wickenkamp*, 77 Ill. 92; *Fain v. Edwards*, *Busbee* L. 64; *Outlaw v. Hurdle*, 1 Jones (N. C.) L. 150; *John v. State*, 16 Ga. 200; *Bru-ton v. State*, 21 Tex. 337.

² *McClintock v. Whittemore*, 16 N. H. 268; *Wiggin v. Plumer*, 31 N. H. 251. See *infra*, § 572.

XIV. REEXAMINATION.

§ 572. As to matters that require explanation, or as to new matter introduced by the opposing interest, a party has a right, in rebuttal, to reexamine his witnesses. As to new matter, however, he cannot ordinarily reexamine.¹ It has been said, in qualification of this limitation, that where a witness has been shown to have formerly made inconsistent statements out of court, he may be asked to explain the motive and circumstances of such statements,² or generally, to explain or modify what he has said.³

§ 573. It is also said that when a witness is cross-examined as to inadmissible matter, the party calling the witness has a right to reexamine as to such matter.⁴

§ 574. In peculiar cases when justice will be thereby promoted, the judge may, at his discretion, permit a witness to be recalled in order to be reexamined by the party recalling him.⁵ This, however, will only be granted on due cause being shown,⁶ and, as a matter of discretion, is not review-

¹ Queen's case, 2 B. & B. 297; J. L. 495. See *Winchell v. Latham*, R. v. St. George, 9 C. & P. 488; 6 Cow. 682.

Prince v. Samo, 7 A. & E. 627; *S. C.* 3 N. & P. 139; *Sturge v. Buchanan*, 10 A. & E. 605; *Dutton v. Woodman*, 9 Cush. 255; *Com. v. Wilson*, 1 Gray, 337; *Baxter v. Abbott*, 7 Gray, 71; *First Nat. Bk. v. Green*, 43 N. Y. 298; *Somerville R. R. v. Doughty*, 22 N. J. L. 495; *McCracken v. West*, 17 Ohio, 16; *Great West. R. R. v. Haworth*, 39 Ill. 346; *Wickenkamp v. Wickenkamp*, 77 Ill. 92; *Farmers' Bk. v. Young*, 36 Iowa, 45; *Jaspers v. Lane*, 17 Minn. 296; *Campbell v. State*, 23 Ala. 44; *Babcock v. Babcock*, 46 Mo. 243; *State v. Denis*, 19 La. An. 119; *State v. Scott*, 24 La. An. 161; *Bayless v. Estes*, 1 Heisk. 78; *People v. Keith*, 50 Cal. 137; *Ferguson v. Rutherford*, 7 Nev. 385.

² *R. v. Woods*, 1 Crawf. & Dix, 439.

³ *Gilbert v. Sage*, 5 Lansing, 287; *Somerville R. R. v. Doughty*, 22 N. J. L. 495. See *Winchell v. Latham*, 6 Cow. 682.

⁴ *Blewitt v. Tregonning*, 3 Ad. & E. 554; though see *Smith v. Dreer*, 3 Whart. R. 154; *Allen v. Hancock*, 16 Vt. 230.

"It is within the discretion of the court to permit any question to be asked on re-direct examination which it was proper to have admitted on the examination in chief." *Cooley, J., Hemmens v. Bentley*, 32 Mich. 89. See *Anderson v. State*, 42 Ga. 9; *Donnelly v. State*, 26 N. J. L. 463; *Stockwell v. Holmes*, 33 N. Y. 53.

⁵ 2 Phil. Ev. 408; *Bevan v. McMahon*, 2 Sw. & Tr. 55; *Phettiplace v. Sayles*, 4 Mason, 312; *U. S. v. Wilson*, 1 Baldw. 78; *Beach v. Bank*, 3 Wend. 573; *Thomas v. State*, 27 Ga. 287; *Dunham v. Forbes*, 25 Tex. 23.

⁶ *Hallock v. Smith*, 4 Johns. Ch. 649; *Hanson v. Church*, 11 N. J. Eq. 441; *Curren v. Connery*, 5 Binn. 488; *Thomasson v. State*, 22 Ga. 499.

able by the appellate court.¹ So a witness may, at the discretion of the court, be permitted to return to the stand, after dismissal, to correct his testimony.² A witness may also be recalled at the request of the jury.³

¹ *People v. Mather*, 4 Wend. 229; *Covanhoven v. Hart*, 21 Penn. St. 495; *Howell v. Com.* 5 Grat. 664; *White v. Bailey*, 10 Mich. 155; *Williams v. Allen*, 40 Ind. 295; *Ross v. Hayne*, 3 Greene, 211; *State v. Rorabacher*, 19 Iowa, 154; *State v. Haynes*, 71 N. C. 79; *Colclough v. Rhodus*, 2 Rich. (S. C.) 76; *State v. Silver*, 3 Dev. L. 332; *Jesse v. State*, 20 Ga. 156; *Bigelow v. Young*, 30 Ga. 121; *Gayle v. Bishop*, 14 Ala. 552; *Freleigh v. State*, 8 Mo. 606; *German Bk. v. Kerlin*, 53 Mo. 382; *Cotton v. Jones*, 37 Tex. 34.

² *Kingston v. Tappen*, 1 Johns. Ch. 368; *Walker v. Walker*, 14 Ga. 242; *Dunn v. Pipes*, 20 La. An. 276.

³ *Van Huss v. Rainbolt*, 2 Coldw. 139.

On the subject of reopening a case after it has been formally closed, we have the following: "The court of appeals has just reversed a decision of Vice Chancellor Bacon under somewhat unusual circumstances. The plaintiff in the case had filed a bill against the defendant to restrain an alleged nuisance caused by the noxious vapors proceeding from the latter's chemical works; and for the defence it was suggested, among other pleas, that the plaintiff, who was a varnish manufacturer, was in the habit of using chemicals which emitted noxious vapors, and was in fact himself the creator of the nuisance by which he was annoyed. In support of this a scientific witness was called, who stated that the 'Brunswick black,' which the plaintiff manufactured, contained 'foreign asphaltum,' a substance which, as he proved by an experiment in court,

gave off a noxious vapor. The counsel for the defendant accordingly commented severely in his speech on the plaintiff's alleged attempt to deceive the court by the suppression of this important fact; and at the close of his address the plaintiff's counsel asked leave to adduce evidence to show that the whole of this was a mere mistake; that there were two kinds of asphaltum, and that the one which the plaintiff used gave forth no noxious vapors at all. This evidence, however, Vice Chancellor Bacon considered it too late to admit. The court of appeal, however, admitted it, and on the strength of it reversed the vice chancellor's decision. It was admitted by Sir George Bramwell in his judgment, that the vice chancellor had had the advantage of having the witnesses themselves before him, while the court of appeal had only had the short-hand notes of the evidence. The importance, too, of the provision of the judicature act for the *voir dire* examination of witnesses in chancery, had to be borne in mind. But the legislature had also contemplated and made provision for the reversal of a vice chancellor's decision by the appeal court, even although the former had had the advantage of having the witnesses before him. And in this case the vice chancellor ought certainly to have admitted the evidence which he excluded. Not to allow the plaintiff to rebut the evidence produced against him was most unfair, and, with every respect to the vice chancellor, he must say that the plaintiff ought to have been recalled." *Pall Mall Budget*, Nov. 25, 1876.

§ 575. Whenever explanation is required of answers on re-examination, then the cross-examining party may re-cross-examine, confining himself to the new matter introduced on the re-examination.¹ It is, however, at the discretion of the court to close such re-cross-examination when party seeking it has had abundant prior opportunity to draw out his case.²

Re-cross-examination permitted at discretion of court.

XV. PRIVILEGED COMMUNICATIONS.

§ 576. A lawyer, no matter in what capacity he may be employed, is not, by Anglo-American law, permitted to disclose communications made to him by his client in the course of their professional relations. Oral communications are thus protected;³ and *a fortiori* does the privilege extend to cases stated for the opinion of counsel,⁴ and to written instruments held by counsel or attorneys on behalf of clients.⁵ The privilege is essential to public justice; for, did it not exist, "no man would dare to consult a professional adviser, with a view to his defence, or to the enforcement of his rights."⁶ Nor is the privilege in any way affected by the statutes making parties witnesses;⁷ though it is said that a party making himself a witness cannot, on ground of the statute, refuse to answer as to his confidential communications to his counsel.⁸

Lawyer not permitted to disclose communications of client.

¹ Wood v. McGuire, 17 Ga. 303.

² Thornton v. Thornton, 39 Vt. 122; Com. v. Niekerson, 5 Allen, 518; Koenig v. Bauer, 57 Penn. St. 168; State v. Hoppiss, 5 Ired. L. 406.

³ Cromack v. Heathcote, 2 B. & B. 4; Carpmæl v. Powis, 1 Phill. 692; Greenough v. Gaskell, 1 Myl. & K. 101; Chant v. Brown, 9 Hare, 790; Jenner v. R. R. 7 Q. B. 767; Skinner v. R. R. L. R. 9 Exch. 298; Woolley v. R. R. L. R. 4 C. P. 602; Maxham v. Place, 46 Vt. 434; Higbee v. Dresser, 103 Mass. 523; Williams v. Fitch, 18 N. Y. 550; Britton v. Lorenz, 45 N. Y. 57; Graham v. People, 63 Barb. 468; Bellis, in re, 38 How. (N. Y.) Pr. 79; Jenkinson v. State, 5 Blackf. 465; Orton v. McCord, 33 Wise. 205;

Chahoon v. Com. 21 Grat. 822; State v. Hazleton, 15 La. An. 72.

⁴ Pearse v. Pearse, 1 De Gex & Sm. 25.

⁵ Laing v. Barclay, 3 Stark. R. 42; Doe v. James, 2 M. & Rob. 47; Volant v. Soyer, 13 C. B. 231; Hawkins v. Howard, R. & M. 64; Bargaddie Coal Co. v. Wark, 3 Macq. Sc. Ca. 468; Crosby v. Berger, 11 Paige, 377. *Infra*, § 585.

⁶ Lord Brougham in Greenough v. Gaskell, 1 Myl. & K. 103.

⁷ Montgomery v. Pickering, 116 Mass. 227; Brand v. Brand, 39 How. Pr. 193; Barker v. Kuhn, 38 Iowa, 395. See *supra*, § 479.

⁸ Woburn v. Henshaw, 101 Mass. 193.

§ 577. The privilege extends to all knowledge possessed by the lawyer which he would not have obtained if he had not been consulted professionally by his client.¹ Even when a solicitor writes letters to a third party for the purposes of a suit, the answers are privileged;² and so letters passing between a country solicitor and his town agent are privileged.³ Communications, even with lay agents, with regard to the preparation of a case, are in like manner protected.⁴

¹ *Greenough v. Gaskell*, 1 M. & K. 98. Where, in an action by the payee of a promissory note against the maker, it appeared that the plaintiff had acted as attorney to the defendant, and while holding that capacity had obtained documentary evidence from the defendant which he stated was wanted to assist her in preparing a case for counsel; and on this he relied to take the note out of the statute of limitations. It was held that the evidence was inadmissible for the plaintiff; *Platt, B.*, observing that it would never have been in the hands of the attorney, except for the purpose of his preparing a case for counsel; and *Martin, B.*, added: "The client might be in error in thinking the communication necessary to be laid before counsel; but if she communicated it *bonâ fide*, considering it necessary, the communication was privileged and could not be divulged." *Cleave v. Jones*, 6 Ex. 573.

² *Simpson v. Brown*, 33 Beav. 483.

³ *Catt v. Tourle*, 19 W. R. 56.

⁴ *Ross v. Gibbs*, L. R. 8 Eq. 522; *Preston v. Carr*, 1 Y. & J. 175. *Infra*, § 594.

Mr. Stephen, in his treatise on Evidence, thus speaks:—

ARTICLE 115. *Professional communications*.—No legal adviser is permitted, whether during or after the termination of his employment as such, unless with his client's express consent, to disclose any communication,

oral or documentary, made to him as such legal adviser, by or on behalf of his client, during, in the course, and for the purpose of his employment, whether in reference to any matter as to which a dispute has arisen or otherwise, or to disclose any advice given by him to his client, during, in the course, and for the purpose of such employment. It is immaterial whether the client is or is not a party to the action in which the question is put to the legal adviser.

This article does not extend to,—

(1.) Any such communication as aforesaid made in furtherance of any criminal purpose;

(2.) Any fact observed by any legal adviser, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether his attention was directed to such fact by or on behalf of his client or not;

(3.) Any fact with which such legal adviser became acquainted otherwise than in his character as such. The expression, "legal adviser," includes barristers and solicitors, their clerks, and interpreters between them and their clients.

Illustration.—A, being charged with embezzlement, retains B., a barrister, to defend him. In the course of the proceedings, B. observes that an entry has been made in A.'s account book, charging A. with the sum said to have

Sir James Wigram thus briefly states the necessity of the rule: "So long as the state of the law shall make it impossible for parties to be their own lawyers, and to act without professional advice, it is indispensably necessary that the privileges now conceded to professional communications should be maintained."¹ Lord Brougham, on the same topic, makes the following distinction: "To compel a party himself to answer upon oath, even as to his belief and thought, is one thing; nay, to compel him to disclose what he has written and spoken to others, not being his professional advisers, is competent to the party seeking the discovery; for such communications are not necessary to the conduct of judicial business, and the defence or prosecution of men's rights by the aid of skilful persons. To force from the party himself the production of communications made by him to professional men, seems inconsistent with the possibility of an ignorant man resorting to professional advice, and can only be justified if the authority of decided cases warrants it. But no authority sanctions the much wilder violation of professional confidence, and in circumstances wholly different, which would be involved in compelling counsel, or attorneys, or solicitors, to disclose matters committed to them in their professional capacity; and which, but for their employment as professional men, they would not have become possessed of."²

§ 578. A formal retainer is not necessary to constitute a relationship whose communications the law will treat as inviolable.³ It is enough, to enable the protection of the law to apply, that a legal adviser is sought for

Not necessary that relationship should be formally instituted.

been embezzled, which entry was not in the book at the commencement of B.'s employment. This being a fact observed by B. in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, is not protected from disclosure in a subsequent action by A. against the prosecutor in the original case for malicious prosecution. *Brown v. Foster*, 1 H. & N. 736.

ARTICLE 116. *Confidential communications with legal advisers.*—No

one can be compelled to disclose to the court any communication between himself and his legal adviser, which his legal adviser could not disclose without his permission, although it may have been made before any dispute arose as to the matter referred to.

¹ *Woods v. Woods*, 4 Hare, 83, Wigram, V. C.

² *Greenough v. Gaskell*, 1 Myl. & K. 98.

³ *Ross v. Gibbs*, L. R. 8 Eq. 522; *Foster v. Hall*, 12 Pick. 89; *Beltzhoover v. Blackstock*, 3 Watts, 20.

the purpose of confidential professional advice, "with a view either to the prosecution of a claim, or a defence against a claim."¹ The protection has been even held to reach cases in which a person has been consulted under the belief that he was a professional lawyer, which he really was not;² and also, to cases where the communications were made under the erroneous belief that the party consulted had consented to act as counsel.³ An attorney, however, has been compelled to testify as to non-confidential statements made to him, before retainer, by one who afterwards became his client.⁴ An injunction of secrecy is not necessary to protect the communications.⁵

§ 579. It has been already incidentally noticed that it is not necessary that the communications should be in reference to any particular suit. Lord Shelborne thus recapitulates the equity practice in a case where discovery was sought from the plaintiff:⁶ "There is a (judgment) by that most accurate and learned judge, Sir R. T. Kindersley,⁷ which contains a statement of the vice chancellor's view of the principle, and also of the rule which in 1859 had come to be well settled and established in this court on the foundation of that principle. He says, 'It is not now necessary, as it formerly was, for the purpose of obtaining production, that the communications should be made either during or relating to an actual or even to an expected litigation. It is sufficient if they pass as professional communications in a professional capacity.' I can only say that I agree with the views both of the principle and of its proper extension taken in these later authorities."

Nor that the communications should be made during litigation.

Lord Brougham, in a case which Mr. Hare adopts as leading

¹ Sir John Stuart in *Ross v. Gibbs*, L. R. 8 Eq. 522; *S. P.*, *Wilson v. R. L. R.* 14 Eq. 477; *Minet v. Morgan*, L. R. 8 Ch. 361; *Sargent v. Hampden*, 38 Me. 581; *March v. Ludlam*, 3 Sandf. Ch. 35. See, however, *Wilson v. Rastall*, 4 T. R. 753.

Communications by a married woman to her husband's attorney, as to her separate interests, are privileged. *Scranton v. Stewart*, 52 Ind. 68.

² *Calley v. Richards*, 19 Beav. 401. *Contra*, *Bellis*, in re, 3 Ben. 386; *Sample v. Frost*, 10 Iowa, 266.

³ *Smith v. Fell*, 2 Curt. 667.

⁴ *Cutts v. Pickering*, 1 Ventr. 197.

⁵ *Wheeler v. Hill*, 16 Me. 329.

⁶ *Minet v. Morgan*, L. R. 8 Ch. 361. See, also, *Turton v. Barber*, L. R. 17 Eq. 329.

⁷ *Lawrence v. Campbell*, 4 Drew. 485.

and masterly,¹ argues forcibly to the same effect: "We are here to consider, not the case which has frequently arisen in courts of equity, and more than once since I came into this court, of a party called upon to produce his own communications with his professional advisers." . . . "Here the question relates to the solicitor, who is called upon to produce the entries he made in accounts and letters received by him, and those written (chiefly to his town agent) by him, or by his direction, in his character or situation of confidential solicitor to the party; and I am of opinion that he cannot be compelled to disclose papers delivered, or communications made to him, or letters, or entries made by him in that capacity." After the passage, attributed to him above, he proceeds (speaking of counsel and solicitor): "As regards them, it does not appear that the protection is qualified by any reference to proceedings pending or in contemplation. If, touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, either from a client *or on his account, and for his benefit in the transaction of his business*;² or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to their client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information, or produce the papers in any court of law or equity, either as party or witness. If this protection were confined to cases where proceedings had commenced, the rule would exclude the most confidential, and, it may be, the most important of all communications; those made with a view of being prepared for instituting or defending suit, up to the instant that the process of the court issued. If it were confined to proceedings begun or in contemplation, then every communication would be unprotected which a party makes with a view to his general defence against attacks which he apprehends, although at the time no one may have resolved to assail him. But, were it allowed to extend over

¹ Hare on Discovery (2d ed.), 148, ² On the words in italics, see Ford 158, citing *Greenough v. Gaskell*, 1 v. Tennant, 32 Beav. 162. Myl. & K. 98, 100, 101, 115.

such communications, the protection would be insufficient, if it only included communications more or less connected with judicial proceedings; for a person oftentimes requires the aid of professional advice upon the subject of his rights and his liabilities, with no reference to any particular litigation, and without any other reference to litigation generally than all human affairs have, in so far as every transaction may, by possibility, become the subject of judicial inquiry. It would be most mischievous, said the learned judges in the common pleas, 'if it could be doubted whether or not an attorney, consulted upon a man's title to an estate, was at liberty to divulge a flaw.' . . . "The rules of evidence are the same on both sides of the hall."

Lord Lyndhurst, approving of the case just quoted, laid down the rule that where an attorney is employed by a client professionally, to transact professional business, all the communications that pass between the client and the attorney, in the course, and for the purpose of that business, are privileged.¹

§ 580. To permit professional confidence to be invaded when professional relations terminate, would put the client at the counsel's mercy, for professional relations might be terminated in order that professional communications might be disclosed. The client, indeed, may remove the prohibition by consent that his counsel should be examined,² which consent cannot be implied by the client merely calling the lawyer as a witness, without examining him as to such communications.³ If he do not, dissolution of their connection, no matter how it may occur, works no change in regard to the inviolability of their intercourse.⁴ Even an assignee in bankruptcy

Nor is
privilege
lost on
termination
of relationship.

¹ *Herring v. Cloberry*, 1 Ph. 91, a suit to rectify an old settlement, solicitor employed to prepare the deed, but never acted again; *Jones v. Pugh*, 1 Ph. 96, citing *Harvey v. Clayton*, 2 Swans. 221, in note; protection given to a scrivener; *Carpmeal v. Powis*, 1 Ph. 687; sale of an estate; *Davies v. Waters*, 9 Mees. & W. 608; deed only read by attorney just previously at a consultation; *Wheatley v. Williams*, 1 Mees. & W. 553, per Lord

Abinger. The privilege extends to an attorney's clerk. *Taylor v. Forster*, 2 Car. & P. 195, cited *Hare on Disc.* 161.

² *Merle v. More*, Ry. & M. 390.

³ *Vaillant v. Dodemead*, 2 Atk. 524; *Bate v. Kinsey*, 1 C. M. & R. 38.

⁴ *Wilson v. Rastall*, 4 T. R. 759; *Cholmondeley v. Clinton*, 19 Ves. 268; *Charlton v. Coombes*, 4 Giff. 372; *Calley v. Richards*, 19 Beav. 401; *Russell v. Jackson*, 9 Hare, 387; *Chant v. Brown*, 7 Hare, 79.

is not empowered to consent that the professional communications of his assignor should be disclosed.¹ Information, however, which is imparted after the relationship terminates, is not privileged.²

§ 581. Nor is it necessary that such communications, to be privileged, should relate to matters in litigation. A scrivener appointed to raise money,³ a conveyancer employed to draw deeds,⁴ counsel consulted as to family or other arrangements without reference to litigation,⁵ are placed under the same restrictions.

But it is otherwise as to a law student whom the party visits for the purpose of obtaining information as to the law.⁶ Communications in preparation of a case are hereafter noticed.⁷

§ 582. Whoever represents a lawyer, in conference or correspondence with the client, is under the same protection as the lawyer himself.⁸ An interpreter intervening between client and lawyer is, therefore, privileged,⁹ and so is the lawyer's executor,¹⁰ but, as we will see, it is other-

The privilege applies as much to communications made before, as to those made during, litigation. *Minet v. Morgan*, L. R. 8 Ch. 361; 42 L. J. Ch. 627; 21 W. R. 467; cf. *Wilson v. North Hampton Railway Co. L. R.* 14 Eq. 477; 20 W. R. 938; *Powell's Evidence* (4th ed.), 118.

¹ *Bowman v. Norton*, 5 C. & P. 177.

² *Cobden v. Kendrick*, 4 T. R. 431.

³ *Turquand v. Knight*, 2 M. & W. 100; though see *Coon v. Swan*, 30 Vt. 6; *De Wolf v. Strader*, 26 Ill. 225.

⁴ *Carpmael v. Powis*, 1 Phill. 687; *Cromack v. Heathcote*, 2 B. & B. 4; though see remarks of Parke, B., in *Turquand v. Knight*, 2 M. & W. 100.

⁵ *R. v. Withers*, 2 Camp. 578; *Waltingham v. Goodricke*, 3 Hare, 124; *Desborough v. Rawlins*, 3 Myl. & Cr. 515; *Sawyer v. Birchmore*, 3 Myl. & Cr. 572; *Carpmael v. Powis*, 9 Beav.

16 (overruling *Williams v. Mudie*, 1 C. & P. 158; *S. C.* 1 C. & P. 158; *Clark v. Clark*, 1 M. & Rob. 3); *Wadsworth v. Hanshaw*, 2 B. & B. 5.

⁶ *Barnes v. Harris*, 7 Cush. 576.

⁷ *Infra*, §§ 593-4.

⁸ *Parker v. Hawkshaw*, 2 Stark. 239; *Du Barre v. Livette*, Pea. R. 77; *Chenton v. Frewen*, 2 Drew. & Sm. 390; *Bunbury v. Bunbury*, 2 Beav. 173; *Walker v. Wildman*, 6 Madd. 47; *Goodell v. Little*, 1 Sim. N. S. 155; *Lafone v. Falkland Islands Co.* 4 Kay & J. 34; *Taylor v. Forster*, 2 C. & P. 195; *Chant v. Brown*, 9 Hare, 790; *Mills v. Oddy*, 6 C. & P. 731; *Ross v. Gibbs*, L. R. 3 Q. B. 91; *Fenner v. R. R. L. R.* 7 Q. B. 767; *Jackson v. French*, 3 Wend. 337; *Brand v. Brand*, 39 How. (N. Y.) Pr. 193; *Sibley v. Waffle*, 16 N. Y. 180.

⁹ *Du Barre v. Livette*, *ut supra*.

¹⁰ *Fenwick v. Reed*, 1 Mer. 114.

wise with a business agent, not a lawyer, or representing a lawyer, whom the client consults.¹

§ 583. The question whether a client can be compelled to disclose his confidential communications to his legal adviser, draws peculiar interest from the statutes enabling parties to be called as witnesses by their opponents. It is obvious that the guard against the disclosure of such communications by counsel would be a mockery if the client could be compelled to disclose that as to which counsel's lips are sealed. It would be absurd to protect by solemn sanctions professional communications when the lawyer is examined, and to leave them unprotected at the examination of the client. The English House of Lords, however, in a case of comparatively early date, intimated that a client might be compelled by bill in equity to disclose any communications made by him to his counsel before litigation had been invoked ;² but in England this distinction has been deplored if not repudiated,³ and in the United States has never been tolerated. The true view is, that communications which the lawyer is precluded from disclosing the client cannot be compelled to disclose.⁴ Where, however, a party offers himself as a witness, it seems that he may be asked as to his communications to his counsel, if part of the case he undertakes to prove.⁵

Client cannot be compelled to disclose his communications to his legal adviser.

§ 584. The protection insured by the relationship of lawyer and client may be lost when not claimed by the party privileged ;⁶ though it is said not to be extinguished

Privilege must be claimed in

¹ *Infra*, § 593.

² *Radcliffe v. Fursman*, 2 Br. P. C. C. 514.

³ *Walsingham v. Goodricke*, 3 Hare, 127 ; *Meath v. Winchester*, 10 Bli. 375 ; *Walker v. Wildman*, 6 Madd. 97 ; *Preston v. Carr*, 1 Y. & G. 175 ; *Pearse v. Pearse*, 1 De Gex & Sm. 24 ; *Minet v. Morgan*, L. R. 8 Ch. Ap. 361. See Dr. Lushington's observations in the *Macgregor Laird*, 1 Ad. & E. 307.

⁴ *Thompson v. Falk*, 1 Drew. 21 ; *Vent v. Pacey*, 4 Russ. 193 ; *Combe v. London*, 1 Russ. 631 ; *Holmes v. Baddeley*, 1 Phill. 476 ; *Hemenway v.*

Smith, 28 Vt. 701 ; *Carnes v. Platt*, 36 N. Y. Sup. Ct. 360 ; *S. C.* 15 Abb. Pr. N. S. 337 ; *Bigler v. Regher*, 43 Ind. 112.

⁵ *Woburn v. Henshaw*, 101 Mass. 193. See *supra*, § 479.

⁶ *Hare on Discovery* (2d ed.), 167 ; *Walsh v. Trevanion*, 15 Sim. 577 ; *Hunter v. Capron*, 5 Beav. 93 ; *Dartmouth v. Holdsworth*, 10 Sim. 476 ; *Thomas v. Rawlings*, 27 Beav. 140. See, however, *People v. Atkinson*, 40 Cal. 284, where it was said that the court would interpose of its own motion ; and see *supra*, §§ 281-283.

order to be applied, and may be waived.

by agreement or compromise.¹ The privilege, *a fortiori*, may be waived by the client.² The evidence of the waiver, however, must be distinct and unequivocal.³

§ 585. What has been said applies, as we have already noticed, with equal force to the client's documents in his lawyer's hands.⁴ Thus it has been held, that when a solicitor holds a document for his client, he cannot, against the will of his client, be compelled to produce it, even by a person who has an equal interest in it with his client.⁵ But a solicitor may be asked whether he has papers of his client in court; and if by his answer, which is compulsory, he admit the fact, secondary evidence of their contents may be given if the originals are not produced.⁶ And although counsel

¹ *Turney v. Bailey*, 34 Beav. 105; *Hughes v. Garnons*, 6 Beav. 352.

² "Several questions of an impeaching nature were excluded, on the ground that Fuller made them to his counsel, and they were, therefore, privileged. We think the rule of privilege was misconstrued. We have no disposition to narrow or hamper privileged communications between clients and their attorneys or counsel. We concur fully in the broad and sensible doctrine laid down by Lord Shelborne, in *Minet v. Morgan*, L. R. 8 Ch. Ap. 361, that neither client nor attorney can be compelled to answer and disclose matters of confidence. But the privilege is one created solely for the benefit of the client, and there is no ground for protection where he waives it. 1 Greenl. Ev. § 243; 1 Stark. Ev. 40; *Benjamin v. Coventry*, 19 Wend. R. 353." *Campbell, J., Hamilton v. People*, 29 Mich. 183.

³ "At the hearing, before a single justice, the plaintiff herself testified, and called as a witness one who had been her legal adviser in reference to the transactions in question. He was not then asked as to his communications with his client, but he was cross-examined by the defendant's counsel

as to all matters of fact which came to her knowledge before the execution of the deed. After the evidence was all in, he was recalled and asked by the defendant what conversations he had, as counsel, with the plaintiff, in reference to making the deed and giving the receipt, and for what reason he advised the delivery of the deed. But it was ruled that what passed between counsel and client was not admissible, and the evidence was excluded.

"It is contended that this ruling was wrong, because exclusion of the evidence offered is a privilege which the client may waive, and in this case has waived, by becoming a witness in her own behalf. But this alone, in the opinion of the court, does not amount to such a waiver." *Colt, J., Montgomery v. Pickering*, 116 Mass. 231.

⁴ *Supra*, §§ 150, 576; *Laing v. Barclay*, 3 Stark. R. 42; *Volant v. Soyer*, 13 C. B. 231; *Bargaddie Coal Co. v. Wark*, 3 Macq. S. C. 668; *Crosby v. Berger*, 11 Paige, 377.

⁵ *Newton v. Chaplin*, 10 C. B. 356.

⁶ *Dwyer v. Collins*, 7 Ex. 639; *Brandt v. Klain*, 17 Johns. 335. *Supra*, § 154; *Powell's Evidence*, 4th edition, 119. See, also, *Phelps v.*

can be compelled to produce any paper whose production would have been obligatory on the client so far as to let in secondary evidence of contents,¹ yet the fact that the papers were communicated to him by his client for his professional opinion, is a good excuse for their non-production.² This production is peculiarly applicable to cases where the lawyer is called upon by subpœna to produce his client's papers, his client being a stranger to the suit. Were it not so, no man's titles, so it is argued in England, could be safe from fishing explorations for the purpose of discovering defects.³ In this country, under our registry system, the reason is less applicable; but the principle still obtains.

§ 586. If a legal adviser permits his client's papers to pass out of his hands into those of strangers, or if such papers are in any way extracted from his custody, they may be put in evidence by the party by whom they are held, as against the client. So far has this been pushed, that it has been held that if an attorney permits a witness to see such writings, such witness, not being a clerk of the attorney or legal adviser of the client, may be called to give secondary evidence of the writings, due notice being first given to produce them on trial.⁴ It is otherwise as to papers passing into the hands of the attorney's agents or representatives; the papers, in such hands, being entitled to the same protection they enjoyed when in the hands of the attorney.⁵

Privilege lost as to instruments parted with by legal adviser.

§ 587. It is easy to conceive of cases in which two or more persons address a lawyer as their common agent. So far as concerns a stranger, their communications to the lawyer would be privileged. It is otherwise, however, as to themselves; and as they stand on the same footing as to the lawyer, either could compel him to testify

Communications, to be privileged, must be made to party's exclusive adviser.

Prew, 3 E. & B. 430; 23 L. J. Q. B. 140.

¹ Ibid.; Ramsbotham v. Senior, L. R. 8 Eq. 575; Campbell, ex parte, L. R. 5 Ch. Ap. 703; Rhoades v. Selin, 4 Wash. C. C. 718; Durkee v. Le-land, 4 Vt. 612.

² Dwyer v. Collins, *ut supra*; Bevan v. Waters, 1 M. & M. 235; Doe Harris, 5 C. & P. 592; Doe v.

Gilbert, 7 M. & W. 102; Doe v. Langdon, 12 Ad. & El. (N. S.) 711. See *supra*, § 581.

³ R. v. Hunter, 3 C. & P. 591, and cases cited above.

⁴ Lloyd v. Mostyn, 10 M. & W. 481; though see Fisher v. Heming, 1 Ph. Ev. 170.

⁵ Fenwick v. Reed, 1 Meriv. 114, 120.

against the other as to their negotiations.¹ So a communication which is made by one party to a mutual attorney for the purpose of being forwarded to the other party, is taken out of the range of confidence, and may be disclosed on trial as far as it was meant to be disclosed before trial.² So when communications from an adverse party are made to the attorney as representing the client, the attorney may be subsequently compelled to disclose such communications.³ It is otherwise, however, when no such liberty of disclosure is given the attorney acting as the common agent. Papers put in his hands by either party, not to be shown to the other, but to be used exclusively for his own information, he will not be permitted to communicate.⁴ Privilege, also, has been held not to extend to communications made to counsel in the presence of all the parties to the controversy;⁵ nor to communications, as we have seen, made by a party to a law student whom the party thinks proper independently to consult;⁶ nor to communications overheard by a third person, so far as such third person is concerned.⁷

§ 588. If it should be held that a lawyer's lips are sealed as to all matters which he heard professionally, though he had at the same time extra-professional knowledge of the same subject matter, then, all that would be necessary, in order to preclude a lawyer from rendering adverse testimony in a case, would be for the party to be injured by such testimony to communicate the same facts to the lawyer in professional confidence. Such a result, however, could not be tolerated; and for this and other reasons, it has been held that privilege in this relation does not extend to information a lawyer has received from others than his client, though his client may have given the same information.⁸

¹ *Shore v. Bedford*, 5 Man. & G. 271; *Reynolds v. Sprye*, 10 Beav. 51; *Warde v. Warde*, 3 M. & Gord. 365; *Earle v. Grout*, 46 Vt. 113; *Hatton v. Robinson*, 14 Pick. 416; *Rice v. Rice*, 14 B. Monr. 417.

² *Perry v. Smith*, 9 M. & W. 681; *Reynolds v. Sprye*, 10 Beav. 51; *Baugh v. Cradoeke*, 1 M. & Rob. 182. See remarks of Parke, B., 5 B. & Ad. 503.

³ *Spenceley v. Schulenburg*, 7 East, 357; *Desborough v. Rawlins*, 3 Myl. & Cr. 515.

⁴ *Doe v. Watkins*, 3 Bing. N. C. 421; *Doe v. Seaton*, 2 A. & E. 171.

⁵ *Britton v. Lorenz*, 45 N. Y. 51.

⁶ *Barnes v. Harris*, 7 Cush. 576.

⁷ *Hoy v. Morris*, 13 Gray, 519.

⁸ *Marsh v. Keith*, 1 Drew. & Sm. 342; *Davies v. Waters*, 9 M. & W.

Peculiarly is this the case when the information was received by the attorney when acting as a party with a joint interest with the client, and not as his professional adviser,¹ or when the knowledge was received in the progress of a trial.² It has also been held that privilege does not protect statements made by client to counsel for the purpose of obtaining information as to matters of fact, as distinguished from matters of law;³ or statements made to the counsel in the presence of third parties, such parties not being concerned in a confidential consultation;⁴ or statements made to counsel in order to induce him to believe that the cause is one he can undertake without breach of duty to another client.⁵

§ 589. It may happen, also, that the information communicated belongs to ordinary as distinguished from professional intercourse; and if this be clearly the case, no professional privilege will shield from disclosure. The topic must be within the peculiar scope of a lawyer's profession.⁶ A lawyer, for instance, may be required to identify his client;⁷ to prove his client's handwriting;⁸ to declare whether certain writings are in his possession, so as to let in secondary evidence,⁹ and to divulge statements made

Information not in the scope of professional duty not privileged.

611; *Lewis v. Pennington*, 20 L. J. Ch. 670; *Follett v. Jefferys*, 1 Sim. N. S. 3, 17; *Mackenzie v. Yeo*, 2 Curt. 866; *Greenough v. Gaskell*, 1 Myl. & K. 104; *Crosby v. Berger*, 11 Paige, 377; *Chillicothe R. R. v. Jameson*, 48 Ill. 281; *Howard v. Copley*, 10 La. An. 504. See, as giving limits to the above, *Davies v. Waters*, 9 M. & W. 608; *People v. Atkinson*, 40 Cal. 284.

¹ *Duffin v. Smith*, Pea. R. 108; *Rochester v. Bk.* 5 How. Pr. 259.

² *Brown v. Foster*, 1 H. & N. 736.

³ *Bramwell v. Lucas*, 2 B. & C. 743; *Desborough v. Rawlins*, 3 Myl. & C. 515; *Sawyer v. Birchmore*, 3 Myl. & K. 572; *Allen v. Harrison*, 30 Vt. 219.

⁴ *Goddard v. Gardner*, 28 Conn. 172. See *Hoy v. Morris*, 13 Gray, 519.

⁵ *Heaton v. Findlay*, 12 Penn. St. 304.

⁶ *Carpmael v. Powis*, 1 Ph. 687; *Bramwell v. Lucas*, 2 Bar. & C. 745; *Brown v. Foster*, 1 H. & N. 736; *R. v. Leverton*, 11 Cox C. C. 152; *Goodall v. Little*, 20 L. J. Ch. 132; 1 Sim. N. S. 135; *Wheatley v. Williams*, 1 M. & W. 533; *Desborough v. Rawlins*, 3 Myl. & Craig, 515; *Jones v. Goodrich*, 5 Moo. P. C. 16; *Smith v. Daniell*, L. R. 18 Eq. 619; *Clark v. Richards*, 3 E. D. Smith, 89; *Pierson v. Steortz*, *Morris* (Iowa), 136.

⁷ *Studdy v. Sanders*, 2 D. & R. 347; *Doe v. Andrews*, 2 Cowp. 816.

⁸ *Hurd v. Moring*, 1 C. & P. 372; *Johnson v. Davenport*, 19 Johns. 134; *Brown v. Jewett*, 120 Mass. 215.

⁹ *Ramsbotham v. Senior*, L. R. 8 Eq. 575; *Campbell, ex parte*, L. R. 5 Ch. Ap. 703. See *supra*, § 585.

to him by his client when such statements are simply casual observations, having nothing to do with any legal question as to which the lawyer is consulted.¹ It is now said, however, that he will not be compelled to disclose his client's address,² unless the client be a ward of court,³ or in bankruptcy.⁴ But the condition of the client's mind, when he consults his lawyer, when such condition would be patent to all observers, is not privileged;⁵ nor is the question whether the lawyer was retained by the client, and in what capacity.⁶

§ 590. Nor does the privilege protect parties seeking for information or advice as to prospective infractions of law. Communications of an intended offence of this class counsel are bound to disclose.⁷ The protection of privilege has therefore been withheld from communications to a lawyer for the purpose of raising money on forged securities.⁸ It is scarcely necessary to add that when the

¹ Gillard v. Bates, 6 M. & W. 547; Annesley v. Anglesea, 11 How. St. Tr. 1220.

² Heath v. Creelock, L. R. 15 Eq. 257; though see Studdy v. Sanders, 2 D. & R. 347.

³ Ramsbotham v. Senior, L. R. 8 Eq. 575.

⁴ Cathcart, in re, L. R. 5 Ch. 703.

⁵ Daniel v. Daniel, 39 Penn. St. 191.

⁶ Beckwith v. Benner, 6 C. & P. 681; Heaton v. Findlay, 12 Penn. St. 304; though see *contra*, as to nature of relationship. Chirac v. Reinicker, 11 Wheat. 280; S. C. 2 Pet. 613.

⁷ R. v. Avery, 8 C. & P. 596; R. v. Farley, 2 C. & K. 313; S. C. 1 Den. C. C. 197; R. v. Brewer, 6 C. & P. 363; Follett v. Jefferyes, 1 Sim. N. S. 17; Charlton v. Coombes, 4 Giff. 372; People v. Blakeley, 4 Parker C. R. 176; Bank v. Mersereau, 3 Barb. Ch. 598; People v. Sheriff, 29 Barb. 622; Graham v. People, 63 Barb. 483.

⁸ R. v. Farley, *ut supra*.

"There is no confidence as to the disclosure of iniquity. You cannot

make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part; such a confidence cannot exist." Lord Hatherley, in the case of Garteside v. Outram, 26 L. J. Ch. 113, 114, citing Annesley v. Earl of Anglesea, 17 How. State Trials, 1139; Mornington v. Mornington, 2 John. & H. 697, 703; Gore v. Bowser, 5 D. G. & Sm. 30; Goodman v. Holroyd, 15 C. B. N. S. 839; Blight v. Goodliffe, 18 C. B. N. S. 757; Chartered Bank of India v. Rich, 32 L. J. Q. B. 300, 306; R. v. Jones, 1 Den. C. C. 166; R. v. Farley, 1 Den. C. C. 197. A mere charge is insufficient. Crisp v. Platel, 8 Beav. 62; Charlton v. Coombes, 4 Giff. 372. The court will look at the circumstances of each case. Bassford v. Blakesley, 6 Beav. 131. See, also, Doe d. Shellard v. Harris, 5 Car. & P. 594; Levy v. Pope, Moo. & M. 410. Where there is fraud, there is no privilege. Reynell v. Sprye, 10 Beav. 51; Follett v.

lawyer connives at the illegal purpose, he so far loses his professional character as to preclude him personally from claiming any privilege. "Where a solicitor is party to a fraud, no privilege attaches to the communications with him on the subject, because the contriving of a fraud is no part of his duty as a solicitor."¹ A lawyer, however, cannot be asked, and certainly cannot be compelled to answer, whether his advice to his client did not involve an illegal purpose.²

§ 591. The privilege, it should also be remembered, is meant to protect the living in their business relations, and cannot be invoked when the question arises as to the intention of a deceased person in respect to the disposition of his estate. "The next important limitation," says Mr. Hare,³ of the doctrine, is pointed out by Lord Justice Turner. He said, that "where the rights and interests of clients, and those claiming under them, come in conflict with the rights and interests of third persons, there can be no difficulty in applying the rule." But there is a difficulty where cases of testamentary disposition arise. "The disclosure in such cases can affect no right or interest of the client. The apprehension of it can present no impediment to the full statement of his case to his solicitor, and the disclosures, when made, can expose the court to no greater difficulty than presents itself in cases where the views and intentions of persons, or of the objects for which the disposition is made, are unknown. In the cases of testamentary dispositions, the very foundation of the rule seems to be wanting, and in the absence, therefore, of any illegal purpose being entertained by the testator, there does not appear to be any ground for applying it."⁴

Privilege does not apply to testamentary communications.

§ 592. When the client obtains the lawyer's signature as an attesting witness to an instrument executed by the client, the lawyer is compelled to prove his signature, his privilege in this respect as a professional man yielding to his duties as a witness.⁵ But the surrender is

Lawyer making himself attesting witness loses privilege.

Jefferyes, 1 Sim. N. S. 1. The topic is ably discussed in Hare on Disc. (2d ed.) 163. See, also, *People v. Blakeley*, 4 Parker C. R. 176.

¹ Turner, V. C., in *Russell v. Jackson*, 9 Hare, 392.

² *Doe v. Harris*, 5 C. & P. 594.

³ *Discovery*, 2d edition, 162.

⁴ *Russell v. Jackson*, 9 Hare, 387.

⁵ *Sandford v. Remington*, 2 Ves. 189; *Doe v. Andrews*, 2 Cowp. 845; *Robson v. Kemp*, 5 Esp. 53.

limited to the mere act of attestation ; and an attorney, who has signed as attesting witness a deed whose *bona fides* is contested, though he may be asked as to the attestation, is privileged as to any information derived by him from his client as to the concoction of the instrument.¹

§ 593. Deviating in this respect from the Roman law, the English common law has declined to extend the privilege of inviolability to any communications except those with professional men advising as to the law. Thus it has been held that disclosure of confidential communications will be exacted from bankers,² from clerks,³ and even from medical men,⁴ though as to the latter remedial statutes have been passed.⁵ In England, however, for reasons connected with the complications arising from the old system of the non-recording of titles, trustees cannot be compelled to produce the deeds of their clients.⁶ The better opinion is that agents, not lawyers, employed by a party to collect testimony in preparation for a trial, are privileged.⁷ It would seem extraordinary, in view of the scope of the cases just cited, if one party, in advance of a trial, could compel the other party in this way to disclose all the secrets of his case, though there are intimations in England that such agents have no privilege.⁸ The reports, to railroad companies, of confidential servants, and of medical officers, sent to report on railway accidents, have, however, been held to be privileged, if they present a summary of evidence collected for the company ; though this privilege is not regarded as extending to cases where the agents are employed to treat with injured parties, and to make official returns of such negotiations.⁹

¹ *Wheatley v. Williams*, 1 M. & W. 533 ; *Turquant v. Knight*, 2 M. & W. 98.

² *Loyd v. Freshfield*, 2 C. & P. 325.

³ *Webb v. Smith*, 1 C. & P. 337 ; *Baker v. R. R. L. R.* 3 Q. B. 91.

⁴ *R. v. Gibbons*, 1 C. & P. 97 ; *Duchess of Kingston's case*, 20 How. St. Tr. 572.

⁵ See Wh. Cr. L. § 775 *et seq.* See *infra*, § 606.

⁶ *Davies v. Waters*, 9 M. & W.

608 ; *R. v. Upper Boddington*, 8 D. & R. 726 ; *Doe v. Date*, 3 Q. B. 369 ; *Pickering v. Noyes*, 1 Barn. & Cr. 263.

⁷ *Preston v. Carr*, 1 Y. & J. 175 ; *Ross v. Gibbs*, L. R. 8 Eq. 522.

⁸ *Glyn v. Caulfield*, 3 Mac. & G. 463 ; *Goodall v. Little*, 1 Sim. N. S. 135.

⁹ *Hare on Disc.* 2d ed. 152 ; *Baker v. R. R.* 8 Best & S. 645 ; *Woolley v. R. R.*, L. R. 4 C. P. 602 ; *Cossey v. R. R.*, L. R. 5 C. P. 146 ; *Fenner v. R.*

§ 594. "The communications," says Mr. Hare in his work on Discovery,¹ "between a party, or his legal adviser, and witnesses, are also privileged. There is, in those cases, the same necessity for protection; otherwise, as Lord Langdale remarked, it would be impossible for a party to write a letter for the purpose of obtaining information on the subject of a suit, without incurring the liability of having the materials of his defence disclosed to the adverse party."² Communications between the parties, with regard to the preparation of evidence, are in like manner privileged.³

Communications between party and witnesses privileged.

§ 595. It was at one time urged that telegraphic operators could no more be compelled to disclose the contents of telegrams than could postmasters be compelled to disclose the contents of letters. This view, however, has not found acceptance, and telegraphic agents and operators (if there be no statute to the contrary) are now compelled to produce in court the originals of telegrams, or, if such originals be lost, to give secondary evidence of their contents.⁴

Telegraphic communications not privileged.

R., L. R. 7 Q. B. 767; *Skinner v. R.*
R., L. R. 9 Ex. 298.

¹ Hare on Disc. 2d ed. 1876, 151.

² *Preston v. Carr*, 1 Y. & J. 175; *Ross v. Gibbs*, L. R. 8 Eq. 522; *Curling v. Perring*, 2 Myl. & K. 380; *Storey v. Lennox*, 1 Myl. & C. 525; *Llewellyn v. Baddeley*, 1 Hare, 527; *Lafone v. Falkland Islands Co.* 4 Kay & J. 31; *Gandee v. Stansfield*, 4 De G. & J. 1; *Daw v. Eley*, 2 Hem. & M. 725; *Phillips v. Routh*, L. R. 7 C. P. 289; *Wilson v. R. R.*, L. R. 14 Eq. 477; *Hamilton v. Nott*, L. R. 16 Eq. 112.

³ Hare on Disc. 152, citing *Allan v. Royden*, 43 L. J. (C. P.) 206; though see *Rayner v. Ritson*, 6 Best & S. 888; *Colman v. Truman*, 3 Hurl. & N. 871.

⁴ See *State v. Litchfield*, 58 Me. 267; *Henisler v. Freedman*, 2 Parsons Sel. Ca. 274. And see *infra*, § 617.

"The main question presented for our determination is, whether a telegraphic operator is bound to testify

to the contents of a telegraphic message.

"The case finds the message material to the issue. A verbal message, communicated to the prisoner, would be admissible, and the party communicating it would be compelled state it. So a written message, or its contents, after due notice to produce the original, and a failure of its production by the party notified, would be received in evidence. The mode of transmission to the person delivering the message, whether by telegraph or otherwise, has nothing to do with the matter. The important inquiry relates to its materiality.

"Nor can telegraphic communications be deemed any more confidential than any other communications. Telegraphic communications are not to be protected to aid the robber or assassin in the consummation of their felonies, or to facilitate their escape after the crime has been committed. No communication should be excluded,

§ 596. Whether a priest is privileged as to the confidences of the confessional, is a question that has been much agitated. On the one side it is maintained that the office of a pastor is at least as important to the community as that of a lawyer, and that to the one office the giving and receiving of confidential communications is as essential as it is to the other. It is further urged that by a religious communion, whose members include a large proportion of the population, confession is absolutely enjoined; and that it would be cruel and intolerant to use a religious duty on the part of a large section of the community as an engine for the extortion of secrets for the purposes of litigation. To issue subpoenas, for instance, so it is argued, and bring into the office of a committing magistrate all the Roman Catholic priests in a neighborhood, and then to force them to tell all they have learned in the confessional as to any illegal acts, past or present, would be to unnecessarily plunge the state into a war with an ancient and powerful communion,—a war in which that communion could yield nothing, leaving only two alternatives, equally deplorable: its triumph over the state, or the general imprisonment of its priests and the suppression of its worship. On the other hand, it is insisted that the giving of confidences under the seal of the confessional is not an essential to the pastoral office, but that the

no individual should be exempt from inquiry, when the communication, or the answer to the inquiry, would be of importance in the conviction of crime or the acquittal of innocence, except when such exclusion is required by some grave principle of public policy. The honest man asks for no confidential communications, for the withholding the same cannot benefit him. The criminal has no right to demand exclusion of evidence because it would establish his guilt. *State v. Litchfield*, 58 Me. 269.

“The telegraphic companies cannot rightfully claim that the messages of rogues and criminals, which they may innocently or ignorantly transmit, should be withheld, whenever the

cause of justice renders their production necessary. They cannot wish their servants should, however innocently, coöperate in the commission of crime, and decline to coöperate in its detection and punishment, and thus become its accomplices. The interests of the public demand that resort should be had to all available testimony, which may lead to the detection and punishment of crime, and to the protection of innocence. The telegraph operator, as such, can claim no exemption from interrogation. Like other witnesses, he is bound to answer all inquiries material to the issue.” *Appleton, C. J., State v. Litchfield*, 58 Me. 269. See, also, *U. S. v. Babcock*, 3 Dillon, 566.

pastoral office can be carried on far more efficiently and safely without it than with it. To confess and be absolved, so it is insisted, relieves the conscience from the terror of guilt, and enables the guilty man to spring forward on a new line of law-breaking with purposes at once hardened by past transgressions, and disembarassed by the feeling that these transgressions are no longer counted against him. If the confessional, therefore, be in itself prejudicial to the morals of the community, why should the priest be exempted from the general rule that a witness, when duly brought into court, is to be compelled to tell all he knows about the issue? At all events, there is nothing in the office of a priest which should relieve him from the civic duties of laymen; and among these duties that of bearing testimony in all matters in a court of justice is among the chief. A brother is compelled to disclose the confidences of a brother; a father is compelled to disclose the confidences of a child; there is nothing in a priest's position more sacred than that of brother to brother or of father to child. The analogy of the lawyer, it is added, is not applicable, since lawyers are compelled to disclose all communications which relate to proposed illegal acts, and, what is more, a lawyer is a necessary officer of the courts, which a clergyman is not. These and other reasons have led to a refusal, by the English legislature and courts, to adopt the mediæval canons, privileging communications made in the confessional to priests. The English ecclesiastical law, indeed, invites the penitent to confess his sins, "for the unburdening of his conscience and to receive spiritual consolation and ease of mind;" but the minister, to whom confession is made, is not excused from testifying in a court of justice, but merely enjoined, "under pain of irregularity," not to reveal what is confessed.¹ This has been construed to leave him liable to the prescriptions of the common law, which makes in this respect no distinction between clergyman and layman.²

§ 597. To Roman Catholic priests this rule has been expressly applied both in England and the United States, and it has been held that priests are not privileged in this relation.³ At

¹ Const. & Can. 1 J. 1. Can. exiii;

² Gibs. Cod. p. 963.

³ R. v. Gilham, 1 Moo. C. C. 188.

⁴ Wilson v. Rastall, 4 T. R. 753;

Butler v. Moore, M'Nally's Ev. 253;

Anon. 2 Skin. 404; Du Barree v.

the same time, prosecuting officers, as representing the state, properly shrink from calling upon priests to disclose confessions as evidence against parties on trial for crimes; and eminent judges have gone a great way in encouraging this reluctance. "I, for one," so Best, J., is reported to have said, "will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them, I will receive them in evidence."¹ So it was declared by Alderson, B., in a case where it appeared that a chaplain in a work-house had frequent conversations, in his pastoral capacity, with the inmates, that it was better that the chaplain should not be called as a witness to prove confessions so received by him.² The same sentiment has led to a statute in New York, providing that "no minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rule or practice of such denomination."³ Similar statutes have been enacted in other states.⁴ Under these statutes, however, a communication, to be privileged, must be made in the course of religious discipline.⁵

Livette, Peake's Cas. 77; *R. v. Hay*, 2 F. & F. 4; *Com. v. Drake*, 15 Mass. 161; *Simon v. Gratz*, 2 Penn. R. 417; *State v. Bostick*, 4 Harr. (Del.) 564.

¹ *Broad v. Pitt*, 3 C. & P. 519.

² *R. v. Griffin*, 6 Cox C. C. 219.

³ 2 Rev. Stat. 406, § 72.

⁴ See Whart. Cr. Law, § 775.

⁵ *People v. Gates*, 13 Wend. 323. See 2 Rogers's Rec. 79. See, also, Forsyth's History of Lawyers, 254; Joy on Confes. 49-58; and closing remarks of Field, J., in *Totten v. U. S.*, quoted *infra*, § 604.

R. v. Hay, 2 F. & F. 4, above noticed, led to the following discussion in the house of commons:—

"Mr. Bowyer wished to ask a question regarding the committal of a Roman Catholic priest at Durham.

"It appeared that the reverend gentleman had received a watch, in confession, in order that he might make a

restitution of it to the owner, and had subsequently handed it to a policeman. Upon the trial of a party for stealing the watch, the Roman Catholic priest was asked by Mr. Justice Hill from whom he received the watch. The reverend gentleman refused to answer the question, and was thereupon committed for contempt of court. Mr. Bowyer thought the case a mistaken, and very oppressive one, and that, by the old common law, the seal of confession constituted a privileged communication. He wished to ask if the reverend gentleman had been set at liberty, and if not, whether the government would take steps that he might be immediately released.

"Sir G. C. Lewis said his information differed from that of the honorable gentleman with regard to the law of England. He believed it would be found that while any communication

§ 598. Ecclesiasties are by the Roman common law not required to testify as to what was communicated to them under the seal of the confessional. To this rule, however, the following exceptions have been made : —

1. When the disclosure is required by the policy of the state :
2. When an innocent person is charged with a crime, conviction for which he can only escape by a disclosure of facts given in the confessional :
3. When the clergyman receiving the confession is authorized to testify by the person confessing :
4. When disclosure is necessary in order to prevent an impending crime.¹

§ 599. Arbitrations are regarded with favor, as amicable and efficient methods of terminating litigation which would otherwise be expensive and protracted ; but arbitrations would cease to be amicable and efficient if arbitrators could be brought into court, and be examined as to the reasons of their decisions, so that these decisions could be overhauled. It is not permissible, therefore, to examine an arbitrator as to the reasons which led him to particular conclusions, for this would be collaterally to review his acts ;² nor to prove by him his own misconduct.³ As to matters of fact coming to the knowledge of arbitrators, there is no reason why they should not be examined. To this result there is a concurrence of

Arbitrators cannot be compelled to disclose the grounds of their judgments.

between a counsel, solicitor, or attorney, with a client, respecting a suit in which the latter was engaged, was a privileged communication ; with regard to a clergyman of any denomination, or a physician, no such privilege existed. He, therefore, contended the learned judge had not gone beyond the law. In fact, the question was pressed by counsel, and the court had no option but to commit the witness under the circumstances. He believed, however, that the reverend gentleman only remained in custody a few minutes, and had been discharged in the course of the day.

“Mr. Ingham defended the course pursued by the learned judge, and

fully agreed with the right honorable gentleman, the home secretary, in his interpretation of the law.

“Sir F. Kelly also corroborated the statement as made by the right honorable gentleman.”

See, in reply to this, an interesting work by Mr. Baddely, on the Privilege of Religious Confession, London, 1865. And see Stephen's Ev. 171, and Best's Ev. §§ 583-4, where the inference is that the privilege, if it exists at all, belongs to all clergymen.

¹ See Weiske, Rechtslexicon, xv. 259.

² Johnson v. Durant, 4 C. & P. 327 ; Anon. 3 Atk. 611.

³ Claycomb v. Butler, 36 Ill. 100.

high authority.¹ Thus in a leading case,² Kelly, C. B., supposed the case of an arbitrator "empowered to give compensation for injury to a house numbered 'one' in a particular row of houses, and he professed to award such compensation, although in fact the whole evidence before him related to injury to a house numbered 'two,' and his award really was made for injury to that house. Can it be doubted but that this circumstance might be proved by the defendant on the trial of an action on the award? and if so, I see no reason why it could not be proved by the evidence of the umpire himself. I am therefore of opinion that in this case the umpire's evidence was admissible."³ In the same case in the exchequer chamber,⁴ it was held by all the judges that such an arbitrator might be a witness; Blackburn, J., saying: "There is no case or authority that I can find that says that an umpire or arbitrator is either incompetent as a witness or privileged from giving testimony as to any matter material to the issue. Of course any attempt to annoy an arbitrator by asking questions tending to show that he had mistaken the law, or found a verdict against the weight of evidence, should be at once checked, for these matters are irrelevant. But where the question is, whether he did or did not entertain a question over which he had no jurisdiction, the matter is relevant, and nobody can be better qualified to give testimony on that matter than the umpire."⁵ Mellor, J., remarked, that "it would be unfortunate if there were no means of ascertaining whether or not an arbitrator or umpire, in such a case, had really confined himself within the true limits of the authority conferred upon him." "And it must at least occasionally happen, that without the evidence of the arbitrator there would be no means of arriving at the fact."⁶ The report of the judgment of the case in the house of lords,⁷ contains the result of the opinions of the judges on this point: "That the umpire was admissible as a witness was, without a single exception, the opinion of all the judges

¹ See *Woodbury v. Northy*, 3 Greenl. 85; *Pulliam v. Pensoneau*, 33 Ill. 375; *Mayor v. Butler*, 1 Barb. 325. ² *L. R. 5 H. L. 457.*

³ *Buccleugh v. Metropolitan Board of Works*, L. R. 3 Ex. 306, 324.

⁴ *Bramwell, B.*, who is reported to have thought otherwise, gave no

reasons; and his opinion to the contrary effect is denied. *L. R. 5 H. L. 457.*

⁵ *L. R. 5 Ex. 221.*

⁶ *Ibid.* 234.

⁷ *Ibid.* 246.

⁸ *L. R. 5 H. L. 418, 457.*

who have considered the question in this case." Lord Chelmsford referred to several cases on the subject,¹ and Cleasby, B., said that it was "every day practice for the arbitrator to make an affidavit where a question arises as to what took place before him, and I have known him to be examined as a witness without objection."² The judgment of Lord Cairns, so remarks Mr. Hare, is very clear upon the point in issue, whether as to matters of fact the evidence of an arbitrator is properly admissible. But he does not touch the other question raised by the lord justice, that of matters of law,³ which is a point upon which the judgment of the latter and the dictum of Blackburn, J., differ. In prior cases it "was determined that an arbitrator cannot be made a party to a bill to set aside an award;⁴ and that he is not bound to answer as to his motives for making an award, though he must support a plea of arbitrator with evidence of his good conduct."⁵

§ 600. The privilege of inviolability is necessarily extended to the consultations of judges; though they may be examined, as we have seen, as to what took place before them on trial, in order to identify the case, or prove the testimony of a witness.⁶ The same privilege extends to justices of the peace, with the same liability to be examined as to the facts of the trial.⁷ A presiding judge cannot be sworn as a witness in a case before him.⁸ But where the decision of a judge of

¹ Ibid. 428.

² L. R. 5 H. L. 4, 33.

³ Ibid. 462.

⁴ *Steward v. E. L. Co.* 2 Vern. 380; except where fraud has been charged. *Hare on Disc.* 50.

⁵ *Hare on Discovery*, 50, 181-2.

"I can see no reason why the arbitrator should not be just as well called as a witness as any body else, provided the points as to which he is called as a witness are proper points upon which to examine him. If there is a mistake in point of *subject matter*, — that is, if a particular thing is referred to an arbitrator, and he has mistaken the subject matter on which he ought to make his award; or if there is a

mistake in point of legal principle going directly to the basis on which the award is founded, — these are subjects on which he ought to be examined." *Giffard; L. J., In re Dare Valley Ry. Co.* L. R. 6 Eq. 429.

⁶ *Hare on Disc.* (2d ed. 1876) 182; *Jackson v. Humphrey*, 1 Johns. R. 498; *Heyward*, in re, 1 Sandf. 701. See *Welcome v. Batchelder*, 23 Me. 85; and see *supra*, § 180; *infra*, §§ 785, 986. In *R. v. Gazard*, 8 C. & P. 595, it was doubted whether even as to the facts of a case before him, a judge could be examined.

⁷ *Higberger v. Stiffler*, 21 Md. 338; *Taylor v. Larkin*, 12 Mo. 103.

⁸ *People v. Miller*, 2 Park. C. R.

probate is appealed from, on the ground that he was interested in the estate which his decision settled, it has been held in Massachusetts that he is a competent witness on appeal to prove that he was not interested.¹

§ 601. It was at one time supposed that a grand juror was required by his oath of secrecy to be silent as to what transpired in the grand jury room ;² but it is now held that such evidence, wherever it is material to explain what was the issue before the grand jury, or what was the testimony of particular witnesses, will be required.³ This is the statutory rule in Massachusetts and New York.⁴ A grand juror's testimony, however, will not be received to impeach the finding of his fellows, or even to show what was the vote on the finding.⁵ So a petit juror is not ordinarily permitted to disclose

197. See *Morss v. Morss*, 11 Barb. 510; *McMillen v. Andrews*, 10 Oh. St. 112; *Ross v. Buhler*, 2 Mart. (N. S.) 313; *R. v. Anderson*, 2 How. St. 874.

¹ *Sigourney v. Sibley*, 21 Pick. 101.

It has been ruled in England, that if a judge be sitting with others he may then be sworn, and give evidence. *Trial of the Regicides*, Kel. 12; 5 How. St. Tr. 1181, n. S. C. But in such case, the proper course seems to be for the judge who has thus become a witness to leave the bench, and take no further judicial part in the trial.

Mr. Taylor notices in this relation that on several occasions when trials have been instituted before the high court of parliament, peers, who have been examined as witnesses, have, nevertheless, taken part in the verdict subsequently pronounced. 7 How. St. Tr. 1384, 1458, 1552; 16 How. St. Tr. 1252, 1391. He argues, however, that these cases are not inconsistent with the law as above stated, since in trials before the house of lords, the peers must be regarded at least as much in the light of jurors as of judges; and it has just been shown

that a juryman is not disqualified from acting, simply by being called as a witness. *Taylor*, § 1244.

² Whart. Cr. Law, § 508; *Imlay v. Rogers*, 2 Halst. 347; *State v. Baker*, 20 Mo. 338.

³ *Sykes v. Dunbar*, 2 Selw. N. P. 1059; *U. S. v. Charles*, 2 Cranch C. 76; *Com. v. Hill*, 11 Cush. 137; *Com. v. Mead*, 12 Gray, 167; *State v. Fasset*, 16 Conn. 457; *Huidekoper v. Cotton*, 3 Watts, 56; *Thomas v. Com. 2 Robinson (Va.)*, 795. See *Tindle v. Nichols*, 20 Mo. 326; *State v. Offutt*, 4 Blackf. 355; *Burnham v. Hatfield*, 5 Blackf. 21; *Perkins v. State*, 4 Ind. 222; *Granger v. Warrington*, 3 Gilman, 299; *Burdick v. Hunt*, 43 Ind. 384; *State v. Broughton*, 7 Ired. 96; *Sands v. Robison*, 20 Miss. 704; *Rocco v. State*, 37 Miss. 357; *People v. Young*, 31 Cal. 564; *White v. Fox*, 1 Bibb, 369; *Crocker v. State*, 1 Meigs, 127; *Beam v. Link*, 27 Mo. 261.

⁴ See Whart. Cr. Law, § 509.

⁵ *R. v. Marsh*, 6 Ad. & El. 236; *McLellan v. Richardson*, 1 Shepl. 82; *State v. Fasset*, 16 Conn. 457; *People v. Hulburt*, 4 Denio, 133; *Huidekoper v. Cotton*, 3 Watts, 56; *State v. Beebe*,

the deliberations of the jury when consulting in their private room.¹ He is, however, competent to testify as to the issues actually passed on by the jury of which he was a member, when such question is material on a subsequent trial.²

17 Minn. 241; *State v. McLeod*, 1 Hawks, 344; *State v. Baker*, 20 Mo. 338; *State v. Oxford*, 30 Tex. 428.

“But it is urged that the secrets of the grand jury must be protected — that the oath of the grand juror prohibits their utterance. The juror is sworn, the state’s counsel, his fellows, and his own, to keep secret. But the oath of the grand juror does not prohibit his testifying what was done before the grand jury when the evidence is required for the purposes of public justice or the establishment of private rights. *Burnham v. Hatfield*, 5 Blackf. 21. ‘It seems to us,’ observes Rufin, C. J., in *The State v. Broughton*, 7 Iredell, 96, ‘that the witness (who testifies before the grand jury) has no privilege to have his testimony treated as a confidential communication, but that he ought to be considered as deposing under all the obligations of an oath in judicial proceedings, and, therefore, that the oath of the grand juror is no legal or moral impediment to his solemn examination under the direction of a court, as to evidence before him, whenever it becomes material to the administration of justice.’

“To the same effect was the decision of the supreme court of Indiana in *Perkins v. The State*, 4 Ind. 222. In *Com. v. Hill*, 11 Cush. 137, a member of the grand jury which found an indictment was held to be a competent witness on trial to prove that a certain person did not testify before the grand jury. In *Com. v. Mead*, 12 Gray, 167, it was held that the defendant, for the purpose of impeaching a witness for the commonwealth, on the trial of an indictment, might prove

that he testified differently before the grand jury. So, if to impeach a witness evidence is offered of statements made by him before the grand jury, he may testify in rebuttal what those statements were. *Way v. Butterworth*, 106 Mass. 75. When a witness testifies differently in the trial before the petit jury from what he did before the grand jury, the grand jurors may be called to contradict him, whether his testimony is favorable or adverse to the prisoner. So, in all cases when necessary for the protection of the rights of parties, whether civil or criminal grand jurors may be witnesses. Such seems the result of the most carefully considered decisions in this country.

“In *Low’s case*, 4 Maine, 440, it was held that grand jurors might be examined as witnesses in court, to the question whether twelve of the panel concurred or not in the finding of a bill of indictment. If the counsel of the grand jurors is to be kept secret at all events, the votes of the grand jurors are certainly as much a matter of secrecy as anything done or testified to before them. The action of a grand juror is more especially a matter of his own counsel than any statement of any one else before his body. The assertion, that less than twelve concurred in an indictment, involves necessarily the assertion of who did and of who did not so concur.” *Appleton, C. J., State v. Benner*, 64 Me. 284.

¹ *Studley v. Hall*, 22 Me. 198; *Cluggage v. Swan*, 4 Binn. 150; *Hannum v. Belchertown*, 19 Pick. 311.

² *Haak v. Breidenbach*, 3 S. & R.

§ 602. A juror on trial, who has knowledge of any material facts, must give notice, so that he can be sworn, examined, and cross-examined. He cannot be permitted to give evidence to his fellow jurors without being so sworn.¹ Thus, although, so is the rule stated, "each juryman may apply to the subject before him that general knowledge which any man may be supposed to have; yet if he be personally acquainted with any material particular fact, he is not permitted to mention the circumstances privately to his fellows, but he must submit to be publicly sworn and examined, though there is no necessity for his leaving the box, or declining to interfere in the verdict."² In Michigan, in 1876, this rule was pushed so far as to include the position that if a juror has special capacity, as an expert, to determine as to the genuineness of handwriting, in a case before the court, his conclusions should be communicated by him as a witness on the stand; and it was said by the court, in this connection, that "if a verdict were formed on statements of ordinary facts by one juror to his fellows, this would be a violation of their oaths."³ The principle here invoked is true, if by "ordinary facts" we mean objective phenomena which are the basis of opinion. For a juror, no doubt, to take out of his pocket a writing alleged to emanate from a person whose signature is in controversy, and to

204; *Leonard v. Leonard*, 1 W. & S. 342; *Follansbee v. Walker*, 74 Penn. St. 306.

"It is equally clear that the jurors were competent witnesses. In *Haak v. Breidenbach*, 3 S. & R. 204, and *Leonard v. Leonard*, 1 W. & S. 342, the parol evidence was given by jurors, and in the latter case, under a special objection and exception; yet the judgment was reversed for the rejection of the evidence. There is no principle of law or rule of policy which, in such a case ought to exclude them. It is entirely different from where they are called to impeach a verdict on the ground of their own misbehavior or that of their fellows. *Cluggage v. Swan*, 4 Binney, 150,

though even that has been since questioned. *Ritchie v. Holbrooke*, 7 S. & R. 458." *Sharswood, J., Follansbee v. Walker*, 74 Penn. St. 309.

¹ Taylor, § 1244.

² *R. v. Rosser*, 7 C. & P. 648, per Parke, B.; *Manley v. Shaw*, C. & Marsh. 361, per Tindal, C. J.; *Bennet v. Hartford*, Sty. 233; *Fitz-James v. Moys*, 1 Sid. 133; *Andr.* 231, arg.; *R. v. Heath*, 18 How. St. Tr. 123; *R. v. Sutton*, 4 M. & Sel. 532, 541, 542; 6 How. St. Tr. 1012, n.; *Dunbar v. Parks*, 2 Tyler, 217; *State v. Powell*, 2 Halst. 244; *Howser v. Com.* 51 Penn. St. 332; *M'Kain v. Love*, 2 Hill S. C. 506.

³ *Foster's Will*, cited *infra*, § 713.

offer it to his fellow jurymen as a test paper, would be an impropriety which would vitiate a verdict in any way influenced by such production. But in jurisdictions where the practice is to permit comparison of hands to be made by the jury,¹ the cases must be rare in which one or more jurymen will not have experience and skill in such respect which will make their opinions influential in forming the conclusions of their fellows. What is said of handwriting applies to all other issues involving special knowledge. An engineer on a jury could not, without exercising such influence, even give a silent vote on an issue involving a question of engineering; nor, without similar influence, could a farmer on a question of farming.

§ 603. A prosecuting attorney, it has been held, is privileged from disclosing the proceedings of the grand jury.² Communications, also, made to a prosecuting attorney, relative to suspected criminals, or to the operations of a detective police, are privileged, and are not to be divulged by the attorney without the consent of the person making the communication.³

Prosecuting attorneys privileged as to confidential matters.

§ 604. In England, under the reactionary influences which oppressed judiciary as well as executive, during the administrations which followed the French Revolution, it was held that a crown witness, in a political prosecution, could not be asked as to the quarters from which his information was received; and this sanctity was extended to revenue as well as crown cases.⁴ Even as late as O'Connell's case,⁵ it was held that state policy precluded an investigation into the channels through which information as to breaches of the law reached the prosecuting authorities. To this extent the protection may be granted, limiting it strictly to cases of public as distinguished from private necessity.⁶ For the same reason the executive of

State secrets privileged.

¹ That this is the general practice, with greater or less liberty as to the writings to be received as the standard of comparison, see *infra*, § 713 *et seq.*

² Whart. Cr. Law, § 512; *McLellan v. Richardson*, 13 Me. 82; *Clark v. Field*, 12 Vt. 485; but see *White v. Fox*, 1 Bibb, 369.

³ *Oliver v. Pate*, 43 Ind. 132. See § 604.

⁴ *R. v. Watson*, 32 How. St. Tr. 100; *R. v. Hardy*, 24 How. St. Tr. 753; *Horne v. Bentineck*, 2 B. & B. 162.

⁵ Arm. & T. 178.

⁶ *R. v. Richardson*, 3 Fost. & F. 693; *Atty. Gen. v. Briant*, 15 M. & W. 181; *U. S. v. Moses*, 4 Wash. C. C. 726; *State v. Soper*, 16 Me. 295. See 1 *Burr's Trial*, 186; Wash-

a state, and his cabinet officers, are entitled, in exercise of their discretion, to determine how far they will produce papers, or an-

ington *v.* Scribner, 109 Mass. 487; Gray *v.* Pentland, 2 Serg. & R. 23; Oliver *v.* Pate, 43 Ind. 132.

In a Massachusetts case, on the trial of an indictment for murder, to which the defence was insanity, an expert, called by the government, testified, on cross-examination, that he had given the counsel for the government a statement in writing of his opinion of the defendant's mental condition. The statement was on request handed to the defendant's counsel, who offered it in evidence, but was objected to by the attorney general, who stated that he would only allow it to be used to frame questions for cross-examination. The court refused to allow the statement to be read to the jury, and the defendant's counsel used it to cross-examine the witness. *Held*, that the defendant had no ground of exception. *Com. v. Pomeroy*, 117 Mass. 144.

In *Totten v. The United States*, 98 U. S. (2 Otto) 105, the supreme court of the United States decided a claim to recover compensation for services alleged to have been rendered by the claimant's intestate, William A. Lloyd, under a contract with President Lincoln, made in July, 1861, by which he was to proceed South and ascertain the number of troops stationed at different points in the insurrectionary states, procure plans of forts and fortifications, and gain such other information as might be beneficial to the government of the United States, and report the facts to the President, for which service he was to be paid \$200 a month. The court of claims finds that Lloyd proceeded, under the contract, within the rebel lines, and remained there during the entire period of the war, collecting, and from time

to time transmitting, information to the President, and that upon the close of the war he was only reimbursed his expenses. But the court, being equally divided in opinion as to the authority of the President to bind the United States by the contract in question, decided, for the purposes of an appeal, against the claim, and dismissed the petition.

Field, J., who delivered the opinion in the supreme court, said: "We have no difficulty as to the authority of the President in the matter; he was, undoubtedly, authorized during the war, as commander-in-chief of the armies of the United States, to employ agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy, and contracts to compensate such agents are*so far binding upon the government as to render it lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control. Our objection is not to the contract, but to the action upon it in the court of claims. The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its

swer questions as to public affairs, in a judicial inquiry.¹ In con-

public duties, or endanger the person or injure the character of the agent. If upon contracts of such a nature an action against the government could be maintained in the court of claims whenever an agent should consider himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public. A secret service with liability to publicity in this way would be impossible, and as such services are sometimes indispensable to the government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowances from it as those who dispense that fund may award. The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery. Public policy forbids the maintenance of an action in a court of justice the trial of which would lead to the disclosure of matters which the law itself regards as confidential. This principle is recognized in respect to the confidential relation between husband and wife, counsel and client, physician and patient, and as to the confidences of the confessional."

Chief Justice Eyre states, "that among those questions which are not permitted to be asked are all those questions which lead to the discovery of the channel by which the disclosure was made to the officers of justice, that it is upon the general principle of the convenience of public justice that they are not to be disclosed; that all

persons in that situation are protected from the discovery; and that, if it is objected to, it is no more competent for the defendant to ask who the person was that advised him to make the disclosure, than it is to whom he made the disclosure in consequence of the advice — than it is to ask any other question respecting the channel of communication, or all that was done under it." *Eyre, C. J., R. v. Hardy*, 24 How. St. Tr. 815; *Powell's Evidence*, 4th ed. 132.

This immunity, however, extends only to official counsels. "A witness for the prosecution in a trial for riot may be compelled to state, on cross-examination, whether he is a member of a secret society organized to suppress a sect to which the defendant belongs." *People v. Christie*, 2 Parker C. R. 579.

¹ *Beatstone v. Skene*, 5 H. & N. 838; *Anderson v. Hamilton*, 2 Brod. & B. 156; 1 *Burr's Trial*, 186; *Gray v. Pentland*, 2 Serg. & R. 23; *Yoter v. Sanno*, 6 Watts, 164; *Cooper's case*, Whart. St. Tr. 662; *Marbury v. Madison*, 1 Cranch, 144; *Thompson v. R. R.* 22 N. J. Eq. 111. See *Dickson v. Wilton*, 1 Fost. & F. 425, where Lord Campbell, following *Beatstone v. Skene*, 5 H. & N. 838, intimated that where a head of a department should send papers called for, the judge might examine the papers himself, and determine whether they are such as public policy excludes.

As to privileges of senators of the United States in respect to their consultations, see *Law v. Scott*, 5 Har. & J. 438. In England, members of parliament are privileged from examination as to what took place in parliament. *Chubb v. Salomons*, 3 C. & K. 75.

formity with this view, it has been held that communications in official correspondence relating to matters of state cannot be produced as evidence in an action against a person holding an office, for an injury charged to have been done by him in exercise of the power given to him as such officer; not only because such communications are confidential, but because their disclosure might betray secrets of state policy.¹ And where a minister of state, subpoenaed to produce public documents, objects to do so on the ground that their publication would be injurious to the public interest, the court ought not to compel their publication;² and the question, whether the production of such a document would be injurious to the public service, must be determined by the head of the department having the custody of the paper, and not by the judge.³ This privilege, however, has been held to be personal to the head of a department, and cannot be claimed by a subordinate;⁴ but in a suit against an admiral in the royal navy to recover damages for a collision caused by his flagship, Sir R. Phillimore refused the plaintiff permission to inspect reports of the collision made by the admiral to the lords of the admiralty, the secretary to the admiralty having made an affidavit that their production would be prejudicial to the public service.⁵

§ 605. Public policy also, in view of the importance of keeping intact the prerogatives of the legislature, as well as of the executive, forbids compelling witnesses (whether reporters or members) to answer questions as to debates and votes in either house of the legislature, unless the consent of the house be first

¹ *Anderson v. Hamilton*, 2 B. & B. 156, n. Lord Campbell, C. J. (*Sykes v. Dunbar*, 2 Selw. N. P. 1059; 4 Bl. Comm. 126; note by Mr. Christian of a case at York), once held that a witness cannot refuse to produce a letter which he holds from a secretary of state, to whom it has been addressed in his public character, and who forbids its production. At the same time it must be remembered, that where a document is privileged from production on the grounds of public policy,

secondary evidence of its contents is inadmissible. *Horn v. Bentinck*, 2 B. & B. 130; *Powell's Evidence*, 4th ed. 135.

² *Beatstone v. Skene*, 5 H. & N. 838.

³ *Ibid.*, per Pollock, C. B., 5 H. & N. 853.

⁴ *Dickson v. Lord Wilton*, 1 F. & F. 424.

⁵ *The Bellerophon*, 23 W. R. 248; 41 L. J. Adm. 5.

given.¹ So it was held by Lord Ellenborough,² that while a member of parliament or the speaker may be called on to give evidence of the fact of a member of parliament having taken part or spoken in a particular debate, he cannot be asked what was then delivered in the course of the debate. It has also been held that communications between a governor of a province and his attorney-general are privileged.³ Mere volunteer private communications to the executive are not so privileged.⁴

§ 606. A medical attendant is ordinarily without privilege even as to communications confidentially made to him by his patient.⁵ In the United States, however, statutes, in several jurisdictions, have been passed conferring this immunity,⁶ which statutes virtually prohibit physicians from disclosing information they derive professionally from their relations to their patient.⁷ The privilege of the statute may be waived by the patient.⁸ But it does not apply to testamentary inquiries;⁹ and in any view does not protect con-

Medical attendants not ordinarily privileged.

¹ *Plunkett v. Cobbett*, 5 Esp. 136; *S. C.* 29 How. St. Tr. 71; *Chubb v. Salomons*, 3 C. & K. 75.

² *Plunkett v. Cobbett*, 5 Esp. 136.

³ *Wyatt v. Gore*, Holt, 299. This rule was discussed in the *Rajah of Coorg v. East India Co.* 29 Beav. 350, where it was stated that the production of political documents depends not upon the question whether the person called on to produce them is a party to the suit or not, but upon the danger to the public interests which would result from their publication. Where an officer in the army sued a superior officer for defamation, the alleged libel being contained in evidence given by the latter before a military court of inquiry, the court of exchequer chamber held such evidence to be not only privileged from being the subject of an action for libel, but also wholly inadmissible, since the proceedings of the court being delivered to the commander-in-chief, and held by him on behalf of the sovereign, ought not to be produced except by

her majesty's command or permission. *Dawkins v. Lord Rokeby*, L. R. 8 Q. B. 255; 42 L. J. Q. B. 73; affirmed by the House of Lords, W. N. 1875, p. 154; *Powell's Evidence*, 4th ed. 132.

⁴ *Blake v. Pilford*, 1 M. & Rob. 198.

⁵ *Duchess of Kingston's case*, 20 How. St. Tr. 613; *Baker v. R. R.* 3 C. P. 91; *Mahoney v. Ins. Co.* L. R. 6 C. P. 252.

See, as qualifying this in cases where a physician is employed by a railway company, in special cases, to inquire as to damages from accidents, *Cossey v. R. R.* L. R. 5 C. P. 146; *Skinner v. R. R.* L. R. 9 Ex. 298.

⁶ *Whart. Cr. Law* (7th ed.), § 774; *Elwell's Malpractice*, 320.

⁷ *Edington v. Ins. Co.* 5 Hun (N. Y.) 1; *Kendall v. Grey*, 2 Hilt. (N. Y.) 300; *People v. Stout*, 3 Parker C. R. 670.

⁸ *Johnson v. Johnson*, 14 Wend. 637.

⁹ *Allen v. Public Administrator*, 1 Bradf. (N. Y.) 221.

sultations for criminal purposes.¹ Whether, by the Roman common law, a physician is privileged as to matters confidentially imparted to him by a patient, has been much discussed; and the tendency is to assert the inviolability of such secrets.²

§ 607. Excepting marriage, as is elsewhere shown, there is no domestic relationship recognized by the law as attaching inviolability to its conferences. Thus parents will be compelled to disclose confidential communications from their children;³ servants, those of masters;⁴ friends those of friends.⁵

§ 608. So great is the sanctity attached by the law to marriage, that the lips of parents are, as a rule, sealed on the question of sexual intercourse, so far as such testimony would go to assail the legitimacy of children. Whether there was such intercourse cannot be inquired of from either father or mother, either directly or by aid of circumstances from which the result could be inferred.⁶ This inviolability, however, is limited to cases where legitimacy is at issue, and does not preclude the examination, in cases of bastardy, of a married woman as to her adultery with a third person, when non-access with her husband is first proved.⁷ And it has been held competent for a widow, after her husband's death, to testify in support of her children's legitimacy.⁸ But the mother of a child, begotten before marriage, though born after, is incompetent to prove that the child was not begotten by the husband.⁹ The privilege thus established is not affected by the statutes removing disability from interest.¹⁰

¹ *Hewitt v. Prime*, 21 Wend. 79.

² See a summary of the question in *Weiske's Rechtslexicon*, xv. 259, ff.

³ *Gilb. Ev.* 135.

⁴ *State v. Charity*, 2 Dev. 543; *State v. Isham*, 6 How. (Miss.) 35.

⁵ *Smith v. Daniell*, L. R. 18 Eq. 649.

⁶ *R. v. Luffe*, 8 East, 193; *Goodright v. Moss*, 2 Cowp. 594; *Wright v. Holgate*, 3 C. & K. 158; *R. v. Sourton*, 5 A. & E. 180; *R. v. Mansfield*, 1 Q. B. 444; *Anon. v. Anon.* 22 Beav. 481; 23 Beav. 273; *Ride-*

out's Trusts, L. R. 10 Eq. 41; *Chamberlain v. People*, 23 N. Y. 85; *Boykin v. Boykin*, 70 N. C. 262.

⁷ *Cope v. Cope*, 1 M. & Rob. 272; *R. v. Reading*, Cas. temp. Hard. 79; *Com. v. Connelly*, 1 Browne (Pa.), 284; *Com. v. Shepherd*, 6 Binney, 283; *State v. Pettaway*, 3 Hawks, 623.

⁸ *Moseley v. Eakin*, 15 Rich. (S. C.) 324.

⁹ *Dennison v. Page*, 29 Penn. St. 420.

¹⁰ "That issue born in wedlock,

XVI. DEPOSITIONS.

§ 609. Depositions taken *in perpetuam memoriam*, as belonging to a branch of practice determined by principles common to most jurisprudences, have been already discussed.¹ Depositions of absent or sick witnesses, however, taken under rule of court, as a substitute for oral examinations, are governed by local practice. To give the adjudications in this connection would require, so numerous are they and so abundant in technical distinctions, a separate volume. They are therefore remanded to treatises on practice, to which they more properly belong.

Depositions governed by local laws.

though begotten before, is presumptively legitimate, is an axiom of law so well established, that to cite authorities in support of it would be a mere waste of time. So the rule, that the parents will not be permitted to prove non-access for the purpose of bastardizing such issue, is just as well settled. Many reasons have been given for this rule. Prominent among them is the idea that the admission of such testimony would be unseemly and scandalous, and this not so much from the fact that it reveals immoral conduct upon parts of the parents, as because of the effect it may have upon the child, who is in no fault, but who must, nevertheless, be the chief sufferer thereby. That the parents should be permitted to bastardize the child, is a proposition which shocks our sense of right and decency, and hence the rule of law which forbids it.

"But the counsel for the appellant insists that the case is within the purview of the Act of 1869. The language of that act, at first blush, might seem to include a case of this kind. 'No interest or policy of law shall exclude a party or person from being a

witness in any civil proceeding.' The words we have italicized are those relied upon to support the appellant's theory. But when we come to consider the fact, that 'the interest or policy of law' which the legislature had in view in passing that act, was that which, before that time, excluded parties from testifying in their own suits, or where they had an interest in the subject matter in controversy, it becomes obvious that a case, such as the one under discussion, was not in the legislative mind when that act was passed. It would, therefore, be an unnecessary and violent construction of the statute to make it include a 'policy of law' wholly different from that under contemplation when it was framed. We therefore, without hesitation, adopt the view taken of this question by the learned judge of the court of quarter sessions, and agree with him that the Act of 1869 was not intended to abolish a valuable rule of law founded in good morals and public decency." *Gordon, J., Tioga County v. South Creek Township*, 75 Penn. St. 436, 437.

¹ See *supra*, § 181.

CHAPTER IX.

DOCUMENTS.

I. GENERAL RULES.

A document is an instrument in which facts are recorded, § 614.

Instrument is that which conveys instruction, § 615.

Pencil writing is sufficient, § 616.

Detached writings (*e. g.* letters and telegrams) may constitute contract, § 617.

Relative instrument inadmissible without correlative, § 618.

Admission of part involves admission of whole, § 619.

One part of an account cannot be put in evidence without the rest, § 620.

II. INTERLINEATIONS AND ALTERATIONS.

By Roman law presumption is against corrections and interlineations, § 621.

By our own law, material alterations avoid dispositive instrument, § 622.

Not so immaterial alteration, § 623.

Nor alteration by consent, § 624.

Nor alteration during negotiation, § 625.

As to negotiable paper, alteration avoids, § 626.

Alteration by stranger does not avoid instrument as to innocent and non-negligent holder, § 627.

In writings *inter vivos* presumption is that alteration was made before execution, § 629.

Otherwise as to wills, § 630.

As to ancient documents, burden of exploration is not imposed, § 631.

Blank in document may be filled up, § 632.

III. STATUTES; LEGISLATIVE JOURNALS; EXECUTIVE DOCUMENTS.

Public statutes prove their recitals, § 635.

Otherwise as to private statutes, § 636.

(For proof of public and private statutes, see § 289 *et seq.*)

Journals of legislature proof as to recited facts, § 637.

So of executive documents, § 638.

IV. NON-JUDICIAL REGISTRIES AND RECORDS.

Official registry admissible when statutory, § 639.

So of records of public administrative officer, § 640.

So of records of town meetings, § 641.

A record includes its incidents, § 642.

Record must be of class authorized by law, § 643.

It must be identified and be complete, § 644.

It must indicate accuracy, § 645.

It must not be secondary, § 646.

Books and registries kept by public institutions admissible, § 647.

Log-book admissible under act of Congress, § 648.

(For JUDICIAL RECORDS, see *infra*, § 753.)

V. RECORDS AND REGISTRIES OF BIRTH, MARRIAGE, AND DEATH.

Parish records generally admissible, § 649.

Registries of marriage and death admissible when duly kept, § 653.

So when kept by deceased persons in course of their duties, § 654.

Registry only proves facts which it was the duty of the writer to record, § 655.

Entries must be at first hand and prompt, § 656.

Certificate at common law inadmissible, § 657.

And so of copies, § 658.

Family records admissible to prove family events, § 660.

VI. CORPORATION BOOKS.

Books of a corporation admissible against members, § 661.

But not against strangers, § 662.

When proceedings of corporation can be proved by parol, § 663.

VII. BOOKS OF HISTORY AND SCIENCE; MAPS AND CHARTS.

Approved books of history and geography by deceased authors receivable, § 664.

Books of inductive science not usually admissible, § 665.

Otherwise as to books of exact science, § 667.

Maps and charts admissible to prove reputation as to boundaries, § 668.

And so as against parties and privies, § 670.

VIII. GAZETTES AND NEWSPAPERS.

Gazette evidence of public official documents, § 671.

Newspapers admissible to impute notice, § 672.

So to prove dissolution of partnership, § 673.

But not generally for other purposes, § 674.

Knowledge of newspaper notice may be proved inferentially, § 675.

IX. PICTURES, PHOTOGRAPHS, AND DIAGRAMS.

Pictures and photographs in cases of identity admissible, § 676.

And so of plans and diagrams, § 677.

X. SHOP BOOKS.

Shop books admissible when verified by oath of party, § 678.

Change of law in this respect by statutes making parties witnesses, § 679.

Not necessary that party should have independent recollection, § 680.

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Book must be one of original entry, § 682.

Entries must be contemporaneous, § 683.

Book must be regular, § 684.

Charge must relate to immediate transaction, § 685.

Such books may be secondary, § 686.

When plaintiff's case shows transfer to ledger, the ledger must be produced, § 687.

Writing of deceased party may be proved, § 688.

XI. PROOF OF DOCUMENTS.

Document must be proved by party offering, § 689.

Otherwise when produced by opposite party claiming interest under it, § 690.

Under statutes proof need not be made unless authenticity be denied by affidavit, § 691.

Seal may prove authorization of instrument, § 692.

Substantial identification is sufficient, § 693.

Distinctive views as to corporations, § 694.

Public seal proves itself, § 695.

Mark may be equivalent to signature, § 696.

Stamps when necessary must be attached, § 697.

Documents are to be executed according to local law, § 700.

Identity of alleged signer of document must be shown, § 701.

Document by agent cannot be proved without proving power of agent, § 702.

Documents over thirty years old prove themselves, § 703.

Ancient documents may be verified by experts, § 704.

Handwriting may be proved by writer himself, or by his admissions, § 705.

Party may be called upon to write, § 706.

Seeing a person write qualifies a witness to speak as to signature, § 707.

Witness familiar with another's writing may prove it, § 708.

Burden on party to prove witness incompetent, § 709.

On cross-examination witness may be tested by other writings, § 710.

Comparison of hands permitted by Roman law, § 711.

Otherwise by English common law, § 712.

Exception made as to test paper already in evidence, § 713.

In some jurisdictions comparison is admitted, § 714.

Test papers made for purpose inadmissible, § 715.

Unreasonableness of exclusion of comparison of hands, § 717.

Experts admitted to test writings, § 718.

Photographers in such cases admissible as experts, § 720.

Experts may be cross-examined as to skill, § 721.

Their testimony to be closely scrutinized, § 722.

Attesting witness, when there be such, must be called, § 723.

Collateral matters do not require attesting witness, § 724.

When attestation is essential admission by party is insufficient, § 725.

Absolute incapacity of attesting witness a ground for non-production, § 726.

Secondary evidence in such case is proof of handwriting, § 727.

Such evidence not admissible on proof only of sickness of witness, § 728.

Only one attesting witness need be called, § 729.

Witness may be contradicted by party calling him, § 730.

But not by proving his own declarations, § 731.

Attesting witness need not be called to document thirty years old, § 732.

Accompanying possession need not be proved, § 733.

Deeds by corporations proved by corporate seal, § 735.

Attesting witness need not be called when adverse party produces deed

under notice, and claims therein an interest, § 736.

Where a document is in the hands of adverse party who refuses to produce, then party offering need not call attesting witness, § 737.

Nor need such witness be called to lost documents, § 738.

Sufficient if attesting witness can prove his own handwriting, § 739.

Must be *primâ facie* identification of party, § 739 a.

When statutes make acknowledged instrument evidence, it is not necessary to call attesting witness, § 740.

XII. INSPECTION OF DOCUMENTS BY ORDER OF COURT.

Rule may be granted to compel production of papers, § 742.

So as to public documents, § 745.

Corporation books, § 746.

Public administrative officers, § 747.

Deposit and transfer books § 748.

Inspection must be ordered, but not surrender, § 749.

Previous demand must be shown, § 750.

Production of criminatory document will not be compelled, § 751.

Documents when produced for inspection may be examined by interpreters and experts, § 752.

Deed when pleaded can be inspected, § 753.

Inspection may be secured by bill of discovery, § 754.

Papers not under respondent's control he will not be compelled to produce, § 756.

I. GENERAL CONSIDERATIONS.

§ 614. A "DOCUMENT," in the sense in which the term is used

Document is an instrument on which facts are recorded.

in this treatise, is an instrument on which is recorded, by means of letters, figures, or marks, matter which may be evidentially used. In this sense the term document applies to writings; to words printed, lithographed or photographed; to seals, plates or stones on which inscriptions are cut or engraved; to photographs and pictures; to

maps and plans.¹ So far as concerns admissibility, it makes no difference what is the thing on which the words or signs offered may be recorded. They may be, as is elsewhere seen, on stone or gems,² or on wood,³ as well as on paper or parchment.

¹ Mr. Stephen (Ev. 2, 3), defines a document as "any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of these means, intended to be used, or which may be used, for the purpose of recording that matter." A reviewer in the *Solicitors' Journal* of September 2, 1876, questions the propriety of styling a document, in the above definition, as the "matter" described. The "document," it is urged, is the substance on which is recorded the inscription. As a substitute, the following is suggested: "Document means any substance having any matter expressed or described upon it by means of letters, figures, or marks, or by more than one of these means."

"Documents of a public nature, and of public authority, are generally admissible in evidence, although their authenticity be not confirmed by the usual and ordinary tests of truth, the obligation of an oath, and the power of cross-examining the parties on whose authority the truth of the document depends. The extraordinary degree of confidence thus reposed in such documents, is founded principally upon the circumstance that they have been made by authorized and accredited agents appointed for the purpose, and also partly on the publicity of the subject matter to which they relate, and in some instances upon their antiquity. Where particular facts are inquired into, and recorded for the benefit of the public, those who are empowered to act in making such investigations and memorials are, in fact, the agents of all the individuals

who compose the public; and every member of the community may be supposed to be privy to the investigation. On the ground, therefore, of the credit due to the agents so empowered, and of the public nature of the facts themselves, such documents are entitled to an extraordinary degree of confidence, and it is not requisite that they should be confirmed and sanctioned by the ordinary tests of truth; in addition to this, it would not only be difficult, but often utterly impossible, to prove facts of a public nature by means of actual witnesses examined upon oath." Stark. Evid. 272-3, 4th ed. See acc. *Merrick v. Wakley*, 8 A. & E. 170; *Doe d. France v. Andrews*, 15 Q. B. 759, per Erle, J.

² *Supra*, § 220.

³ *Kendall v. Field*, 14 Me. 30; *Rowland v. Burton*, 2 Harr. (Del.) 288. Wooden tallies were formerly in use in England for the purpose of notching off the numbers, even on public accounts. Pepys, in the third volume of his *Diary*, frequently adverts to this practice. Tallies (see *infra*, § 684) continued to be used in this country by bakers and milkmen. The exchequer tallies, says Mr. Best, *Evidence*, 298, were used as acquittances for debts due to the crown, and for some other purposes. A piece of wood, about two feet long, was cut into a particular uneven form, and scored with notches of different sizes to denote different denominations of coin, the largest denoting thousands of pounds, after which came respectively hundreds, tens, and units of pounds, while shillings and pence were designated by still smaller

§ 615. By the Roman law, *instrumentum* is defined as *omne id, quo causa instrui potest*, even witnesses being included in the general term. In our own law, the term "instrument" has the same wide signification; including whatever may be presented as evidence to the senses of the adjudicating tribunal. Hence as instruments of evidence may be mentioned not merely documents, in the sense in which the term has just been defined, but witnesses, and living things which may be presented for inspection.¹

§ 616. It has been sometimes intimated that ink is necessary to constitute a valid writing, when a writing, as such, is to be proved. But the mode of writing is immaterial, if the thing written, as we have just seen, be legible; and it has been frequently held that pencil writing, if identified, is sufficient to constitute a writing receivable in evidence;² and this even under the statute of frauds.³

notches. The wood was then split down the middle, into two parts, so that the cut passed through the notches. One portion was given out to the accountant, &c., which was called the "tally;" the other was kept by the chamberlain, and called the "counterfoil." The irregular form of the tally, together with the natural inequalities in the grain of the wood, rendered fabrication extremely difficult.

¹ Supra, §§ 345, 347. The Roman commentators mention as an illustration a sick horse, as in a case cited by Glück under the redhibitorian action. Glück, Pand. 22, pp. 3-8. So may be noticed a dog, as to whose character for mischief there may be a contest. Supra, §§ 345-6. A tortoise, brought into court for the purpose of proving an inscription on his shell, would, according to Glück's distinction, be a "document;" and so would the Tichborne claimant, when exhibited to the jury, in order that the tat-

too marks on his arm should be inspected.

² Millett v. Marston, 62 Me. 477; True v. Bryant, 32 N. H. 241; Hill v. Scott, 12 Penn. St. 168; Gratz v. Beates, 45 Penn. St. 495; May v. State, 14 Oh. 461; Rembert v. Brown, 14 Ala. 360. As to records, however, see infra, § 645.

³ Merritt v. Clason, 12 Johns. 106; Clason v. Bailey, 14 Johns. 491. In a case in Pennsylvania in 1875 (Woodward's Will, 1 Weekly Notes, 177), it was left undecided whether a pencil writing on slate would constitute a will, the case not requiring the point to be ruled; but it is difficult to see why, if pencil marks on paper would stand, pencil marks on slate should fail. Bacon's Abr. tit. Wills, § 307, pl. 1; In re Goods of Dyer, 1 Haggard, 219; S. C. 3 Ecc. Rep. 92; Dickenson v. Dickenson, 2 Phillimore, 173; S. C. 1 Ecc. Rep. 222; Mence v. Mence, 18 Vesey, Jr. 348; Green v. Skipworth, 1 Phillimore, 53; S. C. 1 Ecc. Rep. 33.

§ 617. It is elsewhere mentioned,¹ that letters and telegrams may be received as dispositive admissions by the parties from whom they emanate. It is hardly necessary to recall the fact that when taken in connection with a letter, or telegram, or other communication, on the other side, a letter may constitute part of a contract, and is to be construed as such.² The contract may be gathered from a series of connected papers and memoranda;³ but where a person seeks to prove the terms of a contract by a series of letters, he must take the whole of each letter, and cannot pick out part and reject the rest.⁴ A single telegram sent by a purchaser may, if accepted, constitute a sufficient memorandum, within the statute of frauds.⁵ To satisfy the statute, the memorandum need only be signed by the party charged; and, if so signed, is good against him, though not against the other party; and where a written proposal signed by one contracting party is orally assented to by the other, it is a memorandum, within the statute, sufficient to charge the party signing.⁶ A mere insulated telegram, however, cannot be introduced to prove a contract.⁷

Detached writings, e. g. letters and telegrams, may constitute contract.

§ 618. By the Roman law a writing in itself incomplete, but referring to another, cannot be received without the writing to which reference is so made. *Documentum referens sine relato nihil probat*; or, as the rule is more accurately stated, a relative document, *documentum referens*, is not by itself evidence without its complementary document, *documentum relatum*, unless the absence of the latter instrument be satisfactorily accounted for and its contents proved.⁸ Several reasons are given for this rule. The non-production of the complementary writing, it is sometimes argued, is to be regarded as a fraudulent suppression of evidence, so as

Relative writing inadmissible without correlative.

¹ *Infra*, §§ 1127-8.

² *Coupland v. Arrowsmith*, 18 L. T. (N. S.) 755; *Unthank v. Ins. Co.* 4 Biss. 357; *Dunning v. Roberts*, 35 Barb. 463; *Taylor v. Robt. Campbell*, 20 Mo. 254; *Crane v. Malony*, 39 Iowa, 39.

³ *Bauman v. James*, L. R. 3 Ch. 108.

⁴ *Nesham v. Selby*, L. R. 13 Eq.

191; 43 L. J. Ch. 173; affirmed, L. R. 7 Ch. 406; 43 L. J. Ch. 551.

⁵ *Godwin v. Francis*, L. R. 5 C. P. 293; 39 L. J. C. P. 121. *Infra*, § 872.

⁶ *Reuss v. Pickley*, L. R. 1 Ex. 342; 4 H. & C. 588; *Powell's Evidence*, 4th ed. 380. See, as to broker's books, *supra*, § 75; *infra*, § 872.

⁷ *Beach v. R. R.* 37 N. Y. 457.

⁸ Nov. 119, cap. 3.

to deprive, on grounds of policy, the party claiming under the dependent paper of a standing in court. The adjudicating tribunal, it is further insisted, has a right to infer that the suppressed writing would, if in evidence, have defeated the effect of that produced. But these reasons go too far. Of course when the *documentum referens* designates the *documentum relatum* as giving essential interdependent features of the transaction to which the two relate, then the first cannot be received in evidence without the other, because the first is in itself incomplete. But it is otherwise when the *documentum referens* professes to be complete in substance, though condensed in form.¹ The following distinction, however, is to be noticed. When the *documentum referens* emanates from the party against whom it is offered, then it is not necessary for the party offering to prove the authenticity and accuracy of the *documentum relatum*, for these must be regarded as conceded by the party making the *documentum referens*. Where, however, the *documentum referens* emanates from a third party, then the validity of the *documentum relatum* must be proved by party offering the *documentum referens*. In cases of certificates of public officers, this may be done by the certificate itself. But the certificate must purport to be complete.²

§ 619. In our own law this rule has been applied in various relations,³ and it is fully settled that when one writing refers directly or indirectly to another for a fuller description, the admissibility of the first writing involves the admissibility of the second.⁴ So, also, the admission of a writing involves the admission of all self-dis-serving indorsements thereon made by the holder or with his permission.⁵ Thus, where a note is received in evidence, this brings in as evidence all self-dis-serving indorsements of payment on the note.⁶

¹ See this topic fully discussed infra, §§ 1103-1109.

² See L. 14, C. iv. 21; Weiske's Rechtslexicon, xi. 669. See fully supra, § 138.

³ See infra, §§ 924, 1103-5.

⁴ Nesham v. Selby, cited supra, § 617; Clark v. Crego, 47 Barb. 599; Commissioners v. Washington Park, 52 N. Y. 131; Blair v. Hum, 2 Rawle,

104; Satterlee v. Bliss, 36 Cal. 489; Jordan v. Pollock, 14 Ga. 145, and cases cited infra, §§ 924, 1103-5.

⁵ Harper v. West, 1 Cranch C. C. 192; Clarke v. Page, 1 Har. & J. 318; Gilpatrick v. Foster, 12 Ill. 355; Lloyd v. McClure, 2 Greene, Iowa, 139; Carey v. Phil. Co. 33 Cal. 694.

⁶ Plumer v. French, 22 N. H. 450; Brown v. Munger, 16 Vt. 12; Flint

§ 620. The most striking illustration of the principle before us, however, is in respect to accounts. It would be manifestly unfair to permit one item in an account to be read, and to suppress the rest. Hence, when a party puts in evidence the debits in an account stated by the opposite party, then the opposite party has a right to call for the reading of the credits. In other words, a party, by putting a part of an account in evidence, enables his opponent to put in the whole.¹ Detached items in accounts, however, are not necessarily so connected that the one drags in the other.²

One part of an account cannot be admitted without the rest.

II. INTERLINEATIONS AND ALTERATIONS.

§ 621. By the German notarial ordinance of 1512, which has acquired international force, and which is the basis of much subsequent extra-territorial adjudication, it is provided that when a document is complete, and has been acknowledged before a notary, nothing further is to be added to it, even though with the consent of the parties; the object being to give solemnity and finality to the notarial act. It is further required that all interlineations, corrections, or emendations, prior to acknowledgment, shall be specially certified in the attestation of the document; and this is declared to be peculiarly obligatory in cases where the interlineation or correction *in spatio* is not by the hand by which the document is engrossed. The ordinance, however, is directory, not prohibitory, containing no provision that the validity of documents is destroyed by the irregular corrections or emendations. A notary, indeed, who disobeys the ordinance, is subjected to pun-

By Roman law, presumption is against corrections and interlineations.

v. Flint, 6 Allen, 34; *Saunders v. McArthy*, 8 Allen, 42; *Kingman v. Tirrell*, 11 Allen, 97; *Long v. Kingdon*, 25 Ill. 66; *Hopkins v. Chittenden*, 36 Ill. 112; *Baldwin v. Walden*, 30 Ga. 829; *Clark v. Simmons*, 4 Port. 14. See *infra*, § 1103; *Harrell v. Durance*, 9 Fla. 490. And as to effect of indorsements of payment to take a document out of the statute of limitations, see *supra*, §§ 228-30; *infra*, § 1135.

¹ See *infra*, §§ 1103-5, 1135. Bell

v. Davis, 3 Cranch C. C. 4; *Morris v. Hurst*, 1 Wash. C. C. 433; *Prince v. Swett*, 2 Mass. 569; *Com. v. Davison*, 1 Cush. 33; *Walden v. Shelburne*, 15 Johns. R. 409; *Winants v. Sherman*, 3 Hill, 74; *Low v. Payne*, 4 N. Y. 247; *Dewey v. Hotchkiss*, 30 N. Y. 497; *Jones v. Jones*, 4 Hen. & M. 447; *Freeland v. Cocke*, 3 Munf. 352; *Young v. Bank*, 5 Ala. 479; *Lewis v. Dille*, 17 Mo. 64; *White v. Jones*, 14 La. An. 681.

² See *infra*, §§ 1135-1140.

ishment; but whether the document itself is thereby avoided, depends upon the *bona fides* of the transaction. The entering, in the margin of the document, or between its lines, of words evidently necessary to complete the sense of the body of the text, has been regarded as not in itself working invalidity. It is otherwise, however, when the interlineation or addition incorporates new matter, varying the sense of the body of the document; and in such case, to support the document as thus corrected, it must be shown that the correction had the assent of the party bound. It is not to be presumed, without evidence, that a party would sign a solemn document, in which material clauses are interlined, or written in the margin; and this presumption is strengthened when the interlineations or additions are written in a different hand, or with different ink, from the body of the text. Nor do such corrections carry with them any evidence as to their date. The very fact that they are corrections is a presumption, so the Roman jurists argue, that they were written *after* the body of the document; and this negative proof is all that the instrument (unless there be a special memorandum as to the date of the correction) affords. Hence, by the present practice of the Roman common law, if on producing a document there should appear on it unattested interlineations or corrections which are not necessary to complete the sense of the body of the text, or which are otherwise suspicious, the party producing is required to sustain the genuineness of such interlineations or additions. In other words, a party who claims a right by virtue of such interlineations or additions is required to show that they were made before execution. If, however, a right is grounded on their supposed nullity, and the plaintiff claims upon the document as it stands without such corrections, and the defendant pleads that such corrections are genuine and valid, it has been much discussed on which side lies the burden of proof.¹ The question is one admitting of much subtlety of argument, for, adopting the maxim, *Actore non probante, reus absolvitur*, it has to be determined who, as to the point of the validity of the corrections, is the *actor*. The better solution is, that if the corrections impart a new sense to the document, and are not mere insertions of omitted words, they are, *primâ facie*, to be treated as

¹ See Weiske's *Rechtslex.* xi. 676.

outside of the instrument, and hence the plaintiff may treat them as nullities. In such case the burden is on the party relying on them to prove their validity.¹

§ 622. By Anglo-American common law, a material alteration made in a dispositive document (*i. e.* a document sought to be enforced as disposing of rights), when such document was either actually or constructively in the control of a party offering it in evidence, precludes such party from availing himself of the document, if the alteration was not made at or before the execution of the writing, or by consent of the parties.² Were this rule not maintained, a party holding a document might execute or connive at material alterations in its terms, and then take the chance of the alterations being detected, with the consciousness that in case of detection he would be no loser, but could fall back on the instrument in its original frame. So highly is such spoliation of instruments reprobated, that a person who designedly alters in his own favor a note in his hands, will not be permitted to prove the debt represented by the note by other evidence.³ It needs scarcely be added that where an alteration is noted in the attestation of the instrument, this accounts sufficiently for the alteration, virtually incorporating it in the text.⁴

Material
alteration
made in
dispositive
document
avoids it.

¹ See on this point *Chesley v. Frost*, 1 N. H. 145; *Johnson v. McGehee*, 1 Ala. 186; *Carson v. Duncan*, 1 Greene (Iowa), 466.

² *Pigot's case*, 11 Rep. 27; *Master v. Miller*, 4 T. R. 330; 2 H. Bl. 141; *Powell v. Divett*, 15 East, 29; *Mollett v. Wackerbarth*, 5 C. B. 181; *Falmouth v. Roberts*, 9 M. & W. 471; *Davidson v. Cooper*, 11 M. & W. 778; *Parry v. Nicholson*, 13 M. & W. 779; *Campbell v. Christie*, 2 Stark. R. 64; *Forshaw v. Chabert*, 3 B. & B. 156; 6 Moore, 369; *Clifford v. Parker*, 2 M. & Gr. 910; *Smith v. U. S.* 2 Wall. 219; *Sargeant v. Pettibone*, 1 Aik. 355; *Austin v. Boyd*, 21 Pick. 64; *Doane v. Eldridge*, 16 Gray, 254; *Stoddart v. Penniman*, 108 Mass. 366; *Draper v. Wood*, 112 Mass. 315; *Norwich Bank v. Hyde*, 13 Conn. 279;

Booth v. Powers, 56 N. Y. 22; *Churchman v. Smith*, 6 Whart. R. 146; *Hill v. Cooley*, 46 Penn. St. 259; *Diehl v. Emig*, 65 Penn. St. 320; *Charles v. Huber*, 78 Penn. St. 448; *Farmers' Ins. Co. v. Bair*, 3 Weekly Notes, 126; *Cochran v. Nebeker*, 48 Ind. 459; *Walters v. Short*, 10 Ill. 252; *Benedict v. Miner*, 58 Ill. 19; *Johnson v. Pollock*, 58 Ill. 181; *Comstock v. Smith*, 26 Mich. 306; *Caldwell v. McDermitt*, 17 Cal. 464; *Blake v. Lowe*, 3 Desan. (S. C.) 263; *Doster v. Brown*, 25 Ga. 24; *Washington Bk. v. Eeky*, 51 Mo. 272; *Whitesides v. Bank*, 10 Bush, 501; *Loehmane v. Emmerson*, 11 Bush, 69. See *Kimball v. Lamson*, 2 Vt. 138.

³ *Martendale v. Follet*, 1 N. H. 95. See *infra*, § 1265.

⁴ See *Taylor's Ev.* § 1616; *Re-*

§ 623. It sometimes happens that an alteration that is merely immaterial is made by a party either intentionally or unintentionally, though without the other party's consent, after the execution of a document. It would be a hard measure to make such an alteration, innocent in purpose and in effect, operate as an avoidance; and hence, following in this the Roman law, as already given,¹ our courts have ruled that such alteration, when the object of the alteration is to correct an obvious error, shall not be regarded as working such an avoidance.² *A fortiori* is this the case when the alteration is merely formal.³ And the same conclusion is reached where the alteration goes to the substance, but where the altered document is not relied on as the foundation of a right.⁴

§ 624. Nor, unless in those cases where a statute makes certain formalities essential, is a document affected by its alteration, by consent of the parties, subsequent to its execution. What they have made they have a right to vary. Of course, where the execution of the document must be in a particular form, there the alteration, to be operative, must be in the same form.⁵ But unless there be such prohibition, the parties may alter in any way as to which they may agree. Thus, where the words "or order," which had been left out by mistake, were inserted by consent in a note intended to be negotiable, this was held neither to avoid the note, nor

formed *Dutch Church v. Ten Eyck*, 25 N. J. L. 40; *Lazier v. Westcott*, 26 N. Y. 146.

¹ *Supra*, § 621.

² *Bluck v. Gompertz*, 7 Exch. R. 862; *Clapham v. Cologan*, 3 Camp. 382; *Keane v. Smallbone*, 17 C. B. 179; *Waugh v. Bussell*, 5 Taunt. 707; *Major v. Hansen*, 2 Biss. 195; *Herrick v. Baldwin*, 17 Minn. 209.

³ *Sanderson v. Symonds*, 1 B. & B. 426; 4 Moore, 42; *Clapham v. Cologan*, 3 Camp. 382; *Waugh v. Bussell*, 5 Taunt. 707; *Keane v. Smallbone*, 17 C. B. 179; *Aldous v. Cornwell*, L. R. 3 Q. B. 573; *Smith v. Crooker*, 5 Mass. 538; *Brown v. Pinkham*, 18 Pick. 172; *Woolfolk v. Bank*, 10

Bush, 504; *Allen v. Sales*, 56 Mo. 28.

⁴ *Hutchins v. Scott*, 2 M. & W. 809; *Falmouth v. Roberts*, 9 M. & W. 471; *Davidson v. Cooper*, 11 M. & W. 800; *Agr. Cattle Ins. Co. v. Fitzgerald*, 16 Q. B. 432; *Ward v. Lumley*, 5 H. & N. 87; *Cutts v. U. S.* 1 Gall. 69; *U. S. v. Spalding*, 2 Mason, 478. As to distinction between evidential and dispositive documents, see *infra*, §§ 923, 1082.

⁵ *Jacob v. Hart*, 6 M. & S. 142; *Walter v. Cubley*, 2 C. & M. 151; *Stevens v. Lloyd*, M. & M. 292; *Walbridge v. Ellsworth*, 44 Cal. 353. *Infra*, § 901.

to require the imposition of a new stamp.¹ The same rule applies where the alteration is one in conformity with local custom, as where the custom is, when a draft is taken up by the acceptors, to erase all the names therein.²

§ 625. The period after which alterations, not mutual, are fatal, is that of the final delivery of the document. Very often a document may require the signature of several successive parties before its completion, and if so, an alteration may be made, without invalidating it at any time before its final delivery, provided this does not affect the rights of persons who have executed it before the alteration.³ In other words, an alteration after A., B., and C. have signed, though made without their consent, may be good as to E. and F., subsequent signers, whom it materially affects, and good also as to A., B., and C., prior signers, whom it does not materially affect.⁴ So an alteration may be made of a document delivered only as an escrow, provided the rights of prior parties without notice are not thereby affected;⁵ or, generally, as to a grantor who still retains control of a deed, either actually or constructively, and who may be understood to reserve the right to alter the instrument, even though signed by himself, at any time before it passes from him.⁶ What is thus said as to deeds has been applied to marriage settlements,⁷ and to bonds.⁸ In fine, wherever several parties, as in insurance policies and composition deeds, join in a written instrument, the instrument is not regarded as completed, so as to make it open to the application of

Nor by alterations made during negotiation.

¹ Taylor's Evidence, § 1620, citing *Steward*, 14 M. & W. 47. See *Little Byrom v. Thompson*, 11 A. & E. 31; *v. Herndon*, 10 Wall. 26; *Walls v. McGee*, 4 Harr. (Del.) 108.

² *West v. Steward*, 14 M. & W. 49; *Gudgen v. Bassett*, 6 E. & B. 986.

³ *Jones v. Jones*, 1 C. & M. 721; 3 Tyr. 800; *Doe v. Knights*, 5 B. & C. 671; *Xenos v. Wickham*, L. R. 2 H. L. 296; *Richards v. Lewis*, 11 C. B. 1046; *Little v. Herndon*, 10 Wall. 26.

⁴ O'Flaherty, in re, 7 La. An. 640; and see infra, § 632.

⁵ *Blake v. Coleman*, 22 Wis. 415; *Bernstien v. Ricks*, 20 La. An. 409.

⁶ *Davidson v. Cooper*, 11 M. & W. 802, by Lord Abinger; Taylor's Evidence, § 1628, citing also *West v.*

⁷ *Jones v. Jones*, 1 C. & M. 721; 3 Tyr. 890; Taylor's Evidence, § 1630.

⁸ *Matson v. Booth*, 5 M. & Sel. 223.

the rule before us, until executed by all the parties. Until so executed, alterations may be made without invalidating the writing as to the parties previously executing, provided nothing in the alteration affects their rights.¹

§ 626. As to bills and notes, the rule is, that a note or bill becomes closed to alteration as soon as it is available, though not before. This question arises in England chiefly under the stamp laws; and under these acts it has been held generally that every material alteration, whether made before or after acceptance, or with or without consent, will invalidate a bill, as soon as such bill, whatever may be its character as to original consideration, passes to a party, who, as a *bonâ fide* holder for a valuable consideration, is entitled to sue any prior party.² On the other hand, an unindorsed bill for value is not considered complete until it is accepted and returned to the payee.³ *A fortiori*, an accommodation bill is not in this view complete, and so far as concerns parties with notice, may be altered, under the stamp act, after it has been drawn, accepted, and indorsed.⁴ But so far as concerns either of the parties, it cannot, of course, as against such party, be altered at any time after he has signed it, so as to bind him to terms he did not himself adopt.⁵ In an English case decided in 1876, the

¹ Taylor's Evidence, § 1622, citing Davidson v. Cooper, 11 M. & W. 802, per Lord Abinger; West v. Steward, 14 M. & W. 47; Doe v. Bingham, 4 B. & A. 675.

² Outhwaite v. Lumley, 4 Camp. 179; Walton v. Hastings, 4 Camp. 223; Chitty on Bills, 186; Taylor's Evidence, § 1629.

³ Ibid.; Kennerly v. Nash, 1 Stark. R. 452; Sherrington v. Jermyn, 3 C. & P. 374.

⁴ Tarleton v. Shingler, 7 C. B. 812; Doe v. Bingham, 4 B. & A. 675.

⁵ As to filling up blanks in negotiable paper, see *infra*, § 632.

As to burden of proof in such cases, see *infra*, § 629.

"So far as concerns negotiable paper, if an alteration appear to have been made contemporaneously with

the instrument, or if it be made subsequently to its execution, with the privacy of the parties, and there be no fraud on, or evasion of, the stamp laws, its validity may be maintained. But if the alteration be material; Gardner v. Walsh, 5 E. & B. 83, overruling Catton v. Simpson, 8 A. & E. 136; as of the date; Clifford v. Parker, 2 M. & Gr. 905; or amount, or time of payment of a bill of exchange be altered; Warrington v. Early, 2 El. & Bl. 763; or a joint responsibility converted into a joint and several responsibility; Alderson v. Langdale, 3 B. & Ad. 660; the instrument will be void, unless the alteration was made by consent of the parties; and equally so, although made with consent, if the stamp laws are infringed. Perring v. Hone, 4 Bing. 28. So, where a bill has been altered,

evidence was that a person intrusted with a check by the payee to pay into a bank, absconded with it, and after altering the date from the 2d of March to the 26th of March, passed it to the plaintiff for value. The check was not paid, and the plaintiff, who had not been guilty of any negligence in taking the check, sued the drawer. It was held that the alteration invalidated the check; and that the circumstance that the plaintiff had not been guilty of negligence in taking it was immaterial.¹

Negotiable paper, even in the hands of an innocent holder,²

with the privity of an indorser and his indorsee, but without the privity of the acceptor, the latter is discharged. *Master v. Millor*, 1 Smith, L. C. 796, and notes. The same rule holds when the alteration is accidental; *Burchfield v. Moore*, 3 E. & B. 683; or by a stranger without the privity of either party. *Davidson v. Cooper*, 11 M. & W. 778; *S. C.* 13 M. & W. 352; *Crookwit v. Fletcher*, 1 H. & N. 293. Parol evidence may be called to show that a variation between a bought note and a sold note is immaterial. *Holmes v. Mitchell*, 7 C. B. N. S. 361." *Powell's Evidence* (4th ed.), 433.

¹ *Vance v. Lowther*, L. R. 1 Ex. D. 176.

² In *Brown v. Reed*, Sup. Ct. of Penn. 1876, 2 Weekly Notes, 231, it was held that a promissory note, negotiable in form, is not rendered invalid in the hands of a *bonâ fide* holder, because shown to have been detached or torn from another paper containing a contract between the original parties to it, the terms of which would, if known to the holder, have debarred him from suing. It was, however, ruled that the mutilation of a written contract, by cutting or tearing off a portion of it, so as to make the separated portion resemble a promissory note, is a forgery, and, unless negligence in the maker, in signing such an instrument, be shown,

a holder, though *bonâ fide*, and without notice, cannot recover thereon.

The principle of the cases, said Sharswood, J., "is, that if the maker of a bill, note, or check, issues it in such a condition that it may easily be altered without detection, he is liable to a *bonâ fide* holder who takes it in the usual course of business, before maturity. The maker ought, surely, not to be discharged from his obligations by reason, or on account of, his own negligence in executing and issuing a note that invited tampering with. These cases did not decide that the maker would be bound to a *bonâ fide* holder on a note fraudulently altered, however skilful that alteration might be, provided that he had himself used ordinary care and precaution. He would no more be responsible upon such an altered instrument than he would upon a skilful forgery of his handwriting. The principle to which I have adverted is well expressed in the opinion of the court, in *Zimmerman v. Rote*, 75 Penn. St. (25 P. F. Smith), 191. It is the duty of the maker of the note to guard not only himself but the public against frauds and alterations, by refusing to sign negotiable paper made in such a form as to admit of fraudulent practices upon them with ease and without ready detection. But would the facts offered to be given in evidence, and rejected by the court

has been held to be invalidated, so far as concerns the liability of parties not consenting,¹ by the adding, after issue, of an additional maker's name to a joint and several note,² by the converting a joint into a joint and several indebtedness,³ by the erasure or excision of the signature of one of several co-promisors in a joint and several note,⁴ by changing one place of payment for

below, have brought the case within the line of these decisions? We think not. In *Phelan v. Moss*, and in *Zimmerman v. Rote*, the party signed a perfect promissory note, on the margin of, or underneath which, was written a condition which, as between the parties, was a part of the contract, and destroyed its negotiability. But it could easily be separated, leaving the note perfect, and no one would have any reason to suspect that it had ever existed.

"In *Garrard v. Haddan*, 67 Penn. St. (17 Smith) 82, the note was executed with a blank, by which the amount might be increased without any score to guard against such an alteration. In all these cases the defendants put their names to what were on their faces promissory negotiable notes. In the case before us, on the defendant's offer, he did not sign a promissory note, but a contract by which he was to become an agent for the sale of a washing machine. It was, indeed, so cunningly framed that it might be cut in two parts, one of which, with the maker's name, would then be a perfect negotiable note. Whether there was negligence in the maker was clearly a question of fact for the jury. The line of demarcation between the two parts might have been so clear and distinct, and given the instrument so unusual an appearance as ought to have arrested the attention of any prudent man. But it may have been otherwise. If there was no negligence in the maker, the good faith and absence of negligence on the part of the

holder cannot avail him. The alteration was a forgery, and there was nothing to estop the maker from alleging and proving it. The ink of a writing may be extracted by a chemical process so that it is impossible for any but an expert to detect it; but surely, in such a case, it cannot be pretended that the holder can rely upon his good faith and diligence." See, also, *Lochnane v. Emmerson*, 11 Bush, 69.

¹ See *Chitty on Bills*, 181-185; 1 *Smith's L. C.* 776, 811.

² *Gardner v. Walsh*, 5 E. & B. 63, 83; overruling *Catton v. Simpson*, 8 A. & E. 136; 3 N. & P. 248, *S. C.* See *Gould v. Coombs*, 1 Com. B. 543; *Ex parte Yates*, *In re Smith*, 27 L. J. Bank'y, 9; 2 De Gex & J. 191, *S. C.*; *McVean v. Scott*, 46 Barb. 379; *Wallace v. Jewell*, 21 Oh. (N. S.) 163; *Haskell v. Champion*, 30 Mo. 136. It has, however, been held in New York, that the adding a new name where there is but one maker, does not discharge the maker. *Partridge v. Colby*, 19 Barb. 248; *McVean v. Scott*, 46 Barb. 379; *Muir v. Demaree*, 12 Wend. 468; *McCaughy v. Smith*, 27 N. Y. 39; *Miller v. Finley*, 26 Mich. 249. See 2 *Pars. Notes*, 559; 2 *Dan. on Neg. Inst.* § 1388.

³ *Perring v. Hone*, 4 Bing. 28; 12 *Moore*, 135; 2 C. & P. 401, *S. C.*

⁴ *Mason v. Bradley*, 11 M. & W. 590. See *Nicholson v. Revill*, 4 A. & E. 675; 6 N. & M. 192, *S. C.*; *Cumberland Bk. v. Hall*, 1 Halst. 215; See *Mahaive Bk. v. Douglass*, 31 Conn. 170; *Davis v. Coleman*, 7 Ired. 424.

another,¹ by altering or limiting the relations of the parties;² by changing the date;³ by inserting a specific rate of interest,⁴ by changing the time of payment,⁵ by the introduction of a place of payment, though the acceptance still remains a general acceptance,⁶ by the alteration of the medium or currency of payment;⁷ by the addition of a seal;⁸ by adding witnesses in all cases where by the *lex loci solutionis*, or *lex fori*, this changes the degree of the obligation;⁹ and by in any way modifying the consideration.¹⁰

¹ Tidmarsh v. Grover, 1 M. & Sel. 735; R. v. Treble, 2 Taunt. 329; S. C. R. & R. 164; Nazro v. Fuller, 24 Wend. 374; Walker v. Bk. 13 Barb. 637; Sudler v. Collins, 2 Houst. 538.

² Knill v. Williams, 10 East, 431.

³ Master v. Mille, 4 T. R. 320; 2 H. Bl. 140, S. C.; Outhwaite v. Luntley, 4 Camp. 179, per Ld. Ellenborough; Walton v. Hastings, Ibid. 223; 1 Stark. R. 215, S. C. per Ibid.; Cardwell v. Martin, 9 East, 180; Wood v. Steele, 6 Wall. 80; Stephens v. Graham, 7 S. & R. 505; Owings v. Arnot, 33 Mo. 406; Britton v. Dierker, 46 Mo. 591.

⁴ Warrington v. Early, 2 E. & B. 763; Waterman v. Vose, 43 Me. 504; Fay v. Smith, 1 Allen, 477; McGrath v. Clark, 56 N. Y. 34; Neff v. Horner, 63 Penn. St. 327; Patterson v. McNeeley, 16 Oh. St. 348; Hart v. Clouser, 30 Ind. 210; Darwin v. Rippey, 63 N. C. 318.

⁵ Bowman v. Nichol, 5 T. R. 537; Alderson v. Langdale, 3 B. & Ad. 660; Bathe v. Taylor, 15 East, 412; Miller v. Gilleland, 19 Penn. St. 119; Lester v. Rogers, 18 B. Mon. 528; Lewis v. Kramer, 3 Md. 365. See Thomson on Bills, 111; Daniels on Neg. Pap. § 1377.

⁶ Taylor v. Moseley, 1 M. & Rob. 439, n., per Ld. Lyndhurst, C. B.; 6 C. & P. 273, S. C.; Crotty v. Hodges, 4 M. & Gr. 561; 5 Scott N. R. 221,

S. C.; Cowie v. Halsall, 4 B. & A. 197; 3 Stark. R. 36, S. C.; Macintosh v. Haydon, Ry. & M. 362, per Abbott, C. J.; Burchfield v. Moore, 3 E. & B. 683; Desbrowe v. Wetherby, 1 M. & Rob. 438, per Tindal, C. J.; S. C. nom. Desbrow v. Wetherley, 6 C. & P. 758.

⁷ Daniels on Neg. Inst. 349; Martendale v. Follett, 1 N. H. 95; Stevens v. Graham, 7 S. & R. 505; Darwin v. Rippey, 63 N. C. 318.

⁸ U. S. v. Linn, 1 How. 104; Marshall v. Gougler, 10 S. & R. 164.

⁹ Eddy v. Bond, 19 Me. 461; Brackett v. Mountfort, 12 Me. 72.

¹⁰ Knill v. Williams, 10 East, 413; Hereth v. Bk. 34 Ind. 380; Low v. Argrove, 30 Ga. 129; Bank of Commerce v. Barrett, 38 Ga. 126. See Parsons Notes & Bills, 562; Daniels Neg. Pap. § 1391.

As to non-negotiable instruments, it has been held that the instrument is vitiated where a sold note was altered, without the knowledge of the purchaser, by inserting an additional term into the contract. Powell v. Divett, 15 East, 29; Mollett v. Wackerbarth, 5 Com. B. 181. And so where an agreement was apparently converted into a deed, by affixing seals to the signatures of the parties. Davidson v. Cooper, 11 M. & W. 784; 13 M. & W. 353, S. C. in Ex. Ch. And generally an alteration, made subsequent to the investment of rights, cannot dis-

§ 627. Whether an alteration of a document made by a stranger vitiates the document so far as concerns the party in whose custody the document at the time was, has been much discussed. In England, it has been held that the document becomes thereby avoided as to such party, even though he was entirely ignorant of the alteration, and though it was done by an entire stranger.¹

It was said by Lord Denman,² that in such case the "party who may suffer has no right to complain, since there cannot be any alteration except through fraud or laches on his part." As thus guarded, the doctrine may be sustained; since it does not go to avoid documents which were altered by a stranger without any laches on the part of the custodian. That an alteration so effected by a stranger does not avoid a document as to an innocent and non-negligent holder, has been expressly ruled in the United States.³ So the cancellation of a check by accident does not avoid the check.⁴

§ 628. When a document is offered which has been confessedly altered by a stranger in a material matter since its execution, the person holding the document being in no way

turb such rights. *Broadwell v. Stiles*, 3 Halst. 58; *Walls v. McGee*, 4 Harr. (Del.) 108.

¹ *Powell v. Divett*, 15 East, 29; *Mollett v. Wackerbarth*, 5 C. B. 181; *Davidson v. Cooper*, 11 M. & W. 778; *S. C.* 13 M. & W. 343; *Crookwit v. Fletcher*, 26 L. J. Ex. 153; *Bank of Hindostan v. Smith*, 36 L. J. C. P. 241; *Forshaw v. Chabert*, 3 B. & B. 158; 6 Moore, 396; *Fairlie v. Christie*, 7 Taunt. 416. See *Vance v. Lowther*, L. R. 1 Ex. D. 176.

² 13 M. & W. 352.

³ *U. S. v. Spalding*, 2 Mason, 482; *Broadwell v. Stiles*, 3 Halst. 58; *Walls v. McGee*, 4 Harr. (Del.) 108; *Marshall v. Gougler*, 10 S. & R. 164; *State v. Berg*, 50 Ind. 496. See, as to English cases conflicting with *Davidson v. Cooper*, *Argoll v. Cheney*, Palm. 402; *Henfree v. Bromley*, 6 East, 309; *Hutchins v. Scott*, 2 M. & W. 814.

⁴ *Raper v. Birkbeck*, 15 East, 17; *Novelli v. Rossi*, 2 B. & Ad. 757; *Warwick v. Rogers*, 5 M. & Gr. 340. In Ireland, an alteration by a stranger does not avoid a writing. *Surney v. Barry*, Jones, 109, cited *Taylor's Ev.* § 1626.

By the Civil Code of New York, in a clause adopted in several other states, "the party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made by another without his concurrence, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that, he may give the writing in evidence, but not otherwise."

concerned in the alteration, we can conceive of four distinct phases in which the case may be presented. The first is when the alteration was through the negligence of the party bound by the document, in which case his liability, so far as concerns the instrument in its original shape, is not affected. The second is when the alteration is traceable to the negligence of the holder of the document, in which case he must bear the consequence of his negligence. The third phase is where the document is altered without the negligence or fault of either party (*e. g.* where a writing is deposited in the proper public registry, and is there defaced or altered by accident or mischief), in which case, as between the original parties, it would be absurd to say that the party bound by the instrument is released.¹ The fourth phase is where a negotiable instrument is materially altered by an intermediate party holding it, there being no negligence or other culpability on the part of the party suing on it, or by the party sued. In such case a party taking the paper after its alteration takes substantially forged paper, and cannot recover.²

§ 629. An interesting point of practice here comes up, in which a right conclusion has been based upon reasoning somewhat artificial. A party offers in evidence a written instrument in which there is a manifest alteration. Was such an alteration made before or after execution? If before execution, on the principle heretofore stated, it avoids the instrument. But on whom rests the burden, in this respect, to prove the period of alteration? If there is nothing suspicious on the face of the instrument, but the alteration is one which appears to accord with the object of the instrument, then we should say that the burden of proving bad faith in this respect is on the party asserting bad faith.³ In England, the conclusion was once based upon the assumption that as forgery is a crime, and as a crime is not to be presumed, therefore spoliation amounting to forgery is not to be presumed. We need not, however, invoke this principle, which can only have occasional application, to sustain the conclusion here reached. It is sufficient for us to say that when, in a written contract *inter*

In written instruments *inter vivos*, presumption is that alteration was made before execution.

¹ State v. Berg, 50 Ind. 496.

³ Supra, §§ 366, 618; infra, §§ 1313,

² Vance v. Lowther, L. R. 1 Ex. D. 1320.

176. Supra, § 626.

vivos, alterations or interlineations appear, about which alterations or interlineations there is nothing suspicious, the presumption is that they were made before the execution of the instrument; and hence, the burden of proving that they were made after execution falls on the assailant of the instrument. The question of spoliation then goes to the jury as a question of fact.¹ As to negotiable paper, it has been said that the law makes no presumption, but leaves the question of prejudicial alteration to be determined by the jury on all the evidence of the case, though when such alteration is apparent, and is favorable to the party offering the note, then he must bear the burden of explanation.²

¹ *Simmonds v. Rudall*, 1 Sim. N. S. 136; *R. v. Gordon*, Pearce & D. 586; *Doe v. Catamore*, 16 Q. B. 745; *Boothby v. Stanley*, 34 Me. 515; *Beaman v. Russell*, 20 Vt. 213; *Davis v. Jenney*, 1 Mete. (Mass.) 221; *Vose v. Dolan*, 108 Mass. 155; *Bailey v. Taylor*, 11 Conn. 531; *Sayre v. Reynolds*, 5 N. J. L. 737; *Simpson v. Stackhouse*, 9 Penn. St. 186; *Stevens v. Martin*, 18 Penn. St. 101; *Farmers' Ins. Co. v. Blair*, 3 Weekly Notes, 126; *Ramsey v. McCue*, 21 Grat. 349; *Munroe v. Eastman*, 31 Mich. 283; *McCormick v. Fitzmorris*, 39 Mo. 34; *Brown v. Phelon*, 2 Swan, 629; *Bumpass v. Timms*, 3 Sneed, 459; *Wells v. Moore*, 15 Tex. 521; *Muckleroy v. Bethany*, 27 Tex. 551.

On this point the following opinions will be of interest:—

“Exception was taken to the introduction of the chattel mortgage in evidence, on the ground that a suspicious alteration appeared on its face which was not explained. The judge held an explanation not necessary. The original mortgage is not produced here, and we cannot, therefore, inspect it. We cannot presume error, and must therefore suppose that any alteration apparent on its face was not, in the opinion of the circuit judge, suspicious in appearance, and, if so, he ruled correctly in receiving it in evidence.

Unless they are suspicious in appearance, alterations and interlineations are presumed to have been made before the execution of the instrument, not afterwards.” *Sirrine v. Briggs*, 31 Mich. R. 445. The question is for the jury. *Jourden v. Boyce*, 33 Mich. 302.

“A minor objection below was to the admission of one of the patents, on the ground of an erasure. The court left the question to the jury, which was quite as favorable a ruling as the defendant could ask. In the absence of any proof on the subject, the presumption is that the correction was made before the execution of the deed. In a recent case in the queen's bench, Lord Campbell, chief justice, in delivering the opinion of the court, after referring to the note in *Hargrave and Butler's Coke Littleton* 2256, where this rule was asserted, observed: ‘This doctrine seems to us to rest on principle. A deed cannot be altered after it is executed without a fraud or wrong; and the presumption is against fraud or wrong.’ The cases are not uniform in this country, but the most stringent leave the question to the jury.” *Nelson, J., Little v. Herndon*, 10 Wall. 31. See, generally to same effect, *Milliken v. Marlin*, 66 Ill. 13.

² *Johnson v. Marlboro*, 2 Stark. R. 278; *Bishop v. Chambre*, M. & M. 116;

But where the execution of a note as altered is denied, the burden is on the plaintiff to prove the note to be the defendant's.¹

§ 630. It has been ruled in England, that in the case of wills, the presumption (under the provision of the statute of wills requiring alterations to be noted in a memorandum) is that an unnoted alteration was made after the execution of the will;² though the presumption, when the corrections are in themselves consistent with the character of the instrument, is regarded as but faint, and yields readily to slight affirmative evidence, or to presumptions drawn from the good faith of the custodians.³ Blanks, which were left in a will by the testator's direction, and were afterwards found to have been filled in his own handwriting, will be presumed to have been filled by him

3 C. & P. 55; Taylor v. Mosely, 6 C. & P. 273; Carris v. Tattershall, 2 M. & Gr. 890; Knight v. Clements, 8 A. & E. 215; 3 N. & P. 375; Wilde v. Armsby, 6 Cush. 314; Hunt v. Gray, 35 N. J. L. 227; Mouchet v. Cason, 1 Brev. (S. C.) 307; Jones v. Berryhill, 25 Iowa, 289; Davis v. Carlisle, 6 Ala. 707. See § 626.

¹ "If an alteration was made after its execution and without the defendant's consent, the note declared on is not the note of the defendant. The plaintiffs must establish that it is this defendant's note, and on this proposition the plaintiffs have the burden of proof throughout. The plaintiffs rely upon the words of Shaw, C. J., in Davis v. Jenney, 1 Met. 221, 224; 'that an extension of the time was a material alteration, and that the burden of proof was upon the defendant to show the alteration.' That the words are not here used in their technical sense, is evident from the paragraph that follows: 'or, perhaps, to state this last proposition with a little more precision, the proof or admission of the signature of a party to an instrument is *primâ facie* evidence that the instrument written over it is the act of the party; and this *primâ facie*

evidence will stand as binding proof, unless the defendant can rebut it by showing, from the appearance of the instrument itself, or otherwise, that it has been altered.' In Wilde v. Armsby, 6 Cush. 314, it was held that the burden of proof was on the plaintiff to show that an interlineation was made before the instrument was executed. The same rule applies as when a want of consideration is relied on as the defence to a promissory note; the burden of proof is on the plaintiff, upon the whole evidence, to establish that fact. Delano v. Bartlett, 6 Cush. 364; Morris v. Bowman, 12 Gray, 467; Powers v. Russell, 13 Pick. 69, 76. The ruling at the trial was correct." Simpson v. Davis, 119 Mass. 270, 271, Endicott, J.

² Doe v. Catamore, 16 Q. B. 745; Coope v. Boekett, 4 Moore P. C. Cas. 449; Doe v. Palmer, 16 Q. B. 747; Simmons v. Rudall, 1 Sim. (N. S.) 136; Stone, in re, 1 Swab. & Tr. 138; Williams v. Ashton, 1 Johns. & Hem. 115. See Christmas v. Whingates, 3 Swab. & Tr. 81; Wikoff's Appeal, 15 Penn. St. (3 Harris) 281.

³ Cadge, in re, L. R. 1 P. & D. 543; Duffy, in re, Ir. R. 5 Eq. 506.

before execution.¹ But an alteration, shown either directly or inferentially to have been made after attestation, avoids, under the statute of frauds.²

§ 631. Ancient documents, exposed in their archives to the inspection of the curious, may be altered or interlined, sometimes fraudulently, sometimes innocently, by persons having from time to time access to them; and it would be hard if parties should be precluded from putting such documents in evidence by having, as a prerequisite to admission, to explain how such alterations took place. So family letters are often interlined, mutilated, and annotated by other members of the same family; and if such changes require explanation before the letters could be admitted, there could be few cases of admission of such letters, for there are few cases in which such explanation could be given. So, also, with regard to annals and autobiographies, to which subsequent owners are sometimes irresistibly tempted to add notes. Hence it has been properly held, that with regard to the classes of papers above noticed, there is no burden on the party producing to explain alterations, provided the papers were taken from the proper repositories. If so obtained they will be admitted, and their weight will be for the jury.³ Yet this relaxation must be carefully confined to evidentiary papers taken from archives or family repositories.

§ 632. It sometimes happens that a blank, requiring a mere formal filling up, is overlooked at the execution of a document. In such case, it being understood and intended by the parties that the blank should be filled in a particular way, it does not vitiate the document if the requisite words are entered after execution, though this be done by a stranger, or by one party without consulting the other.⁴ The blanks in a deed, for instance, if not of a character vital to it,

¹ *Birch v. Birch*, 6 Ec. & Mar. Ca. 581. See *Greville v. Tayler*, 7 Moore P. C. 327. *Stevens v. Martin*, 18 Penn. St. 101; *Walls v. McGee*, 4 Harr. (Del.) 108.

² *Infra*, § 897; *Charles v. Huber*, 78 Penn. St. 448. ⁴ *Waugh v. Bussell*, 5 Taunt. 707; *Plank Road v. Wetsel*, 21 Barb. 56; *Vose v. Dolan*, 108 Mass. 155; *Newlin v. Beard*, 6 W. Va. 110; *Rainbolt v. Eddy*, 34 Iowa, 440; *Field v. Stagg*, 52 Mo. 534. *Supra*, § 194.

³ *Evans v. Rees*, 10 A. & E. 151; *Trimbletown v. Kemmis*, 9 Cl. & F. 763; *Little v. Herndon*, 12 Wall. 26; *Stagg*, 52 Mo. 534. *Supra*, § 194.

may be so filled up after its execution as to complete the grantor's intention.¹ So where a plaintiff sues as holder of a promissory note, by blank indorsement, he may fill up the indorsement at any time before he puts the note in evidence.² In the same way, where a blank is left for the name of the payee, the holder may fill this blank with his own name.³ So a party who accepts a blank bill of exchange is bound to a *bonâ fide* indorsee for value;⁴ though as between the drawer and the acceptor the blank must be filled within a reasonable time.⁵ So generally, in regard to negotiable paper intrusted by one party to another for the latter's use, authority to the latter to fill blanks is implied from their existence in the instrument. "Beyond all doubt such a party may fill every blank which it is necessary should be filled to perfect the instrument and render it operative within its scope and design, if the terms or words of the instrument sufficiently indicate what that scope and design are."⁶ Writs and other mandates, issuing from courts of justice, are ordinarily, it is scarcely necessary to add by way of illustration, issued in blank, leaving the names of the parties concerned and other material words to be subsequently entered. It is otherwise, however, as to negotiable as well as to non-negotiable instruments, when the blank is filled up so as to change the manifest scope and design of the incomplete instrument. In such case the instrument becomes inoperative, except in case of negotiable paper to *bonâ fide* holders for value, to whom the instrument itself conveys no notice of alteration.⁷

¹ Zouch v. Clay, 1 Ventr. 185; Markham v. Gonaston, Cro. Eliz. 626; Eagleton v. Gutteridge, 11 M. & W. 465; West v. Steward, 14 M. & W. 47; Vose v. Dolan, 108 Mass. 155; Devin v. Himer, 29 Iowa, 297; Clark v. Allen, 34 Iowa, 190.

² Edwards v. Scull, 11 Ark. 325. See supra, § 626.

³ Durnham v. Clogg, 30 Md. 284; Spitler v. James, 32 Ind. 202; Luelen v. Hare, 32 Ind. 211. See, to same effect, German Ass. v. Sendmeyer, cited § 633.

⁴ Montague v. Perkins, 22 L. J. C. P. 187, cited Taylor's Ev. § 1632.

⁵ Temple v. Pullen, 8 Ex. R. 389. See Schultz v. Astley, 2 Bing. N. C. 552.

⁶ Clifford, J., Angle v. Ins. Co. 92 U. S. (2 Otto) 330; cited more fully infra.

⁷ Bank v. Douglass, 31 Conn. 180; Ivory v. Michael, 33 Mo. 400. See Wood v. Steele, 6 Wall. 80.

In Angle v. Life Ins. Co. 92 U. S. (2 Otto) 330, the court held that as between the holder of a negotiable instrument with blanks unfilled and innocent third parties, the holder is to be regarded as the agent of the party committing it to his custody for

§ 633. But a blank in an instrument under seal cannot, unless by a power of attorney under seal, after the delivery of the in-

the purpose of filling the blanks. It was, however, further held that there is no implied authority that the holder may do anything more than *fill the blanks*, and consequently that any material erasure or addition amounts to forgery and renders the instrument void. No actual notice of an alteration is necessary, so it was ruled, if the instrument shows the alteration on its face. These conclusions were held to be applicable to an order for the delivery of funds signed by the authorized officer of an insurance company and intrusted to a sub-agent.

“Even the holders of negotiable securities, taken in the usual course of business, before the securities fall due, are held chargeable with notice, where the marks on the instrument are of a character to apprise one to whom the same is offered of the alleged defect. *Goodman v. Simonds*, 20 How. 365.

“When it is proposed to impeach the title of a holder for value, by proof of any facts and circumstances outside of the written instrument itself, it is a very different matter. He is then to be affected, if at all, by what has occurred between other parties; and he may well claim an exemption from any consequences flowing from their acts, unless it be first shown that he had *knowledge* of such facts and circumstances at the time the transfer was made. These principles are of universal application; but where a person takes a negotiable security which, upon the face of it, is dishonored, he cannot, says Taney, Ch. J., be allowed to claim the privileges which belong to a *bonâ fide* holder. *Andrews v. Pond*, 13 Pet. 65.

“If he chooses to receive it under such circumstances, he takes it with

all the infirmities belonging to it, and is in no better condition than the person from whom he received it; and the same doctrine was enforced and applied in a subsequent case, where, in speaking of a promissory note so marked as to show for whose benefit it was to be discounted, the court held that all those dealing in paper, ‘with such marks on its face, must be presumed to have *knowledge* of what it imported.’ *Fowler v. Brantly*, 14 Pet. 318; *Browne v. Davis*, 3 Term. 80.

“Actual notice in such a case is not required, even in suits founded upon negotiable securities, where the evidence of its infirmity consists of matters apparent on its face; nor is any different or stricter rule applicable in cases like the present, it appearing that the printed words, though erased, so as to be inoperative, were still entirely legible, even to the casual reader, and that the words ‘current funds,’ inserted before the erased word ‘drafts,’ were plainly repugnant to the erased words ‘drafts to the order of,’ which followed them in the same connection.

“Constructive notice in such cases is held sufficient, upon the ground that when a party is about to perform an act which he has reason to believe may affect the rights of third persons, an inquiry as to the facts is a moral duty and diligence an act of justice. Whatever fairly puts a party upon inquiry in such a case is sufficient notice in equity, where the means of knowledge are at hand; and if the party, under such circumstances, omits to inquire and proceeds to do the act, he does so at his peril, as he is then chargeable with all the facts which by a proper inquiry he might have ascer-

strument, be filled up by an agent, by words the effect of which would be to convert an inoperative into an operative instrument.¹ We have also a ruling to the effect that a schedule, though referred to in a deed as "annexed," cannot be annexed, after the execution, by one of the parties, in the other's absence, so as to make the deed operative.² *A fortiori* does the rule above given apply when the blank is filled up in such a way as to change the intentions of the parties;³ or to violate the statute of frauds.⁴ But it is otherwise as to matter which it is usual to fill in after execution, or a matter the parties at execution agree to leave to an agent. Thus it has been correctly held in Pennsylvania, that the execution, by the owner of stock, of a power of attorney to transfer, with the certificate, the blank for the attorney's name not being filled, is evidence of an implied authority in an agent to fill in the name of an attorney to make the transfer, and thus to complete the instrument in the form intended.⁵

§ 634. A subsequent ratification, however, by the principal, cures an unauthorized filling up of the blanks;⁶ *a fortiori* does the insertion bind if made in the party's presence.⁷

III. STATUTES; LEGISLATIVE JOURNALS; EXECUTIVE DOCUMENTS.

§ 635. A public statute has been held admissible in evidence to prove the facts which it recites.⁸ Thus it has been held

tained. *Hawley v. Cramer*, 4 Cow. 717; *Hill v. Simpson*, 7 Ves. Jr. 170; *Kennedy v. Green*, 3 Myl. & K. 722; *Booth v. Barnum*, 9 Conn. 286; *Pitney v. Leonard*, 1 Paige, 461; *Pringle v. Phillips*, 5 Sand. 157." *Clifford, J.*, in *Angle v. Ins. Co.*, *ut supra*.

¹ *Hibblethwaite v. McMorine*, 6 M. & W. 200; *U. S. v. Nelson*, 2 Brock. 64.

² *Weeks v. Maillardet*, 14 East, 568. See *West v. Steward*, 14 M. & W. 48; though see *England v. Downs*, 2 Beav. 522; *Halsey v. Whitney*, 4 Mass. 219; *Keyes v. Brush*, 2 Paige, 311.

³ *Upton v. Archer*, 41 Cal. 85; *Schintz v. McManamy*, 33 Wisc. 299.

⁴ *Supra*, § 624; *infra*, § 901.

⁵ *German Ass. v. Sendmeyer*, 50 Penn. St. 67. See, also, *Wiley v. Moor*, 17 S. & R. 438; and see cases

to the same effect in reference to promissory notes, cited *supra*, § 632. On this principle alterations have been sustained in *Com. Bk. v. Kortright*, 22 Wend. 348; and *Hudson v. Revett*, 5 Bing. 368.

⁶ *Skinner v. Dayton*, 19 Johns. 513; *Cady v. Shepherd*, 11 Pick. 400. See *Whart. on Agency*, § 50; *Hudson v. Revett*, 5 Bing. 269; 2 M. & P. 663; *Tupper v. Foulkes*, 9 C. B. N. S. 797.

⁷ *Ball v. Dunsterville*, 4 T. R. 313; *Harrison v. Elvin*, 3 Ad. & El. 117; *Gardner v. Gardner*, 5 Cush. 483; *Hanford v. McNair*, 9 Wend. 56.

⁸ See *supra*, §§ 286-292; *Whiton v. Ins. Co.* 109 Mass. 30, quoted *infra*, § 638; *Henthorn v. Shepherd*, 1 Blackf. 157. See *State v. Sartor*, 2 Strobbh. 60.

that a recital of a state of war, contained in a public statute, is evidence of such war;¹ and a recital in a statute of public disturbances and riots to be proof of such disturbances and riots.² But such proof is only *primâ facie*.³

§ 636. As long as, in England, the passage of private statutes was conditioned on the approval of the judges, recitals in such statutes were admitted as evidence of the facts they stated.⁴ When, however, this prerequisite was no longer insisted on, such recitals were held only to imply notice in the parties, such notice not reaching to strangers.⁵ Such is no doubt the rule in the United States.⁶ As against the party for whose relief the statute was passed;⁷ and as against the state;⁸ such recitals are *primâ facie* proof; but they are not evidence against strangers.

§ 637. The journals of Congress, and of the state legislatures, are the proper evidence of the action of those bodies.⁹ As a rule they are *primâ facie* proof of the facts they recite.¹⁰ They are records, to be proved by inspection,¹¹ and cannot ordinarily be corrected by parol.¹²

§ 638. The official proclamation and other public documents issued by the executive are to be received as *primâ facie* proof of facts stated in them, when such facts are relevant.¹³ State papers when published under the author-

¹ R. v. De Berenger, 3 M. & S. 67. But would not judicial notice of the war be taken without the statute? Supra, § 339.

² R. v. Sutton, 4 M. & S. 532.

³ R. v. Greene, 6 A. & E. 548.

⁴ Supra, § 292; Wharton Peerage, 12 Cl. & F. 302; Shrewsbury Peerage, 7 H. of L. Cas. 13.

⁵ Shrewsbury Peerage, 7 H. of L. Cas. 13; Beaufort v. Smith, 4 Ex. R. 450; Cowell v. Chambers, 21 Beav. 619; Mills v. Colchester, 36 L. J. C. P. 214; Tayler v. Parry, 1 M. & Gr. 604; Ballard v. Way, 1 M. & W. 329.

⁶ Elmendorff v. Carmichael, 3 Litt. (Ky.) 472.

⁷ State v. Beard, 1 Ind. 460.

⁸ Lord v. Bigelow, 8 Vt. 460.

⁹ Supra, §§ 290-295; Jones v. Randall, 1 Cowp. 17.

¹⁰ Albertson v. Robeson, 1 Dall. 9; Root v. King, 7 Cow. 613; Miles v. Stevens, 3 Penn. St. 21; Green v. Weller, 32 Miss. 650. See R. v. Franklin, 17 How. St. 637. See as to judicial notice of legislative action, supra, §§ 290, 295. It should be added, that the rule in the text should be confined to incidents of legislative action, and not to opinions expressed in resolutions.

¹¹ Coleman v. Dobbins, 8 Ind. 156.

¹² Wabash R. R. v. Hughes, 38 Ill. 176; Covington v. Ludlow, 1 Mete. (Ky.) 295. Infra, § 980 a.

¹³ Thelsson v. Cosling, 4 Esp. 266; R. v. Franklin, 17 How. St. R. 638;

ity of Congress, have a like effect.¹ Thus the diplomatic correspondence communicated by the President to Congress has been held in this sense evidence of the facts communicated.² So the ordinances of foreign states, promulgated by Congress, are held proved by force of such promulgation.³ Army registers, when authenticated by the secretary of war, have been held to be proof of the names of officers, of the dates of their commissions, and of their resignations, though they cannot be received to show the pay and emoluments of officers.⁴ The proclamation of a governor of a state is *primâ facie* evidence of the result of the elections which it recites.⁵ The printed report of a state comptroller to the legislature is evidence of the pertinent facts recited; ⁶ and so is the charter of a city.⁷ But it has been held that a report of the register of the state land office cannot be received to prove that lands have been patented to a railroad company.⁸

IV. NON-JUDICIAL REGISTRIES AND RECORDS.

§ 639. Where a statute requires the keeping of an official record for the public use, by an officer duly appointed for the purpose, and subject not merely to private suit but to official prosecution for any errors, such rec-

Official
register re-
ceivable in
evidence.

Talbot v. Seeman, 1 Cranch, 1; Ross v. Cutchall, 1 Binney, 399.

¹ Watkins v. Holman, 16 Pet. 26; Bryan v. Forsyth, 19 How. U. S. 334; Gregg v. Forsyth, 24 How. U. S. 179; Dutillet v. Blanchard, 14 La. An. 97; Nixon v. Porter, 34 Miss. 697. As to judicial notice, see § 317; Whiton v. Ins. Co. 109 Mass. 24; Radcliff v. Ins. Co. 7 Johns. 38.

“Acts of Congress, and proclamations issued by the secretary of state in accordance therewith, are the appropriate evidence of the action of the national government. Taylor on Ev. (5th ed.) § 1473; 1 Greenl. Ev. § 491. And the volume of public documents, printed by authority of the Senate of the United States, containing letters to and from various officers of state, communicated by the President of the United States to the Senate, was as

competent evidence as the original documents themselves. The King v. Holt, 5 T. R. 436, and 2 Leach (4th ed.), 593; Watkins v. Holman, 16 Peters, 25, 55, 56; Bryan v. Forsyth, 19 How. 334; Gregg v. Forsyth, 24 How. 179; Radcliff v. United Insurance Co. 7 Johns. 38, 50.” Gray, J., Whiton v. Insurance Co. 109 Mass. 30.

² Bryan v. Forsyth, 19 How. U. S. 334; Radcliff v. Ins. Co. 7 Johns. 38.

³ Talbot v. Seeman, 1 Cranch, 1.

⁴ Wetmore v. U. S. 10 Pet. 647. As to judicial notice of military law, see *supra*, § 297.

⁵ Lurton v. Gilliam, 1 Seam. (Ill.) 577.

⁶ Dulaney v. Dunlap, 3 Coldw. 307.

⁷ Howell v. Ruggles, 5 N. Y. 444.

⁸ Gordon v. Bucknell, 38 Iowa, 438.

ord, so far as concerns entries made in it in the course of business, is admissible in evidence as *prima facie* proof of the facts it contains.¹ Nor is it necessary to verify such record by the oath of the person keeping it. That it is directed by statute to be kept for the public benefit, and that it is kept, so far as appears on its face, with regularity and accuracy, entitles it to be received in evidence, and throws the burden of impeaching it on the opposite side.² To make the record itself evidence, it is only necessary that it should be produced, and that it should be proved to have come from the proper depository.³ Thus, under this rule, the English courts have admitted custom-house registries and official papers;⁴ the public registries of municipal and similar corporations;⁵ the registries of parliamentary voters which are in the proper public custody;⁶ the registries of the coast guard noting changes of wind and weather,⁷ and light-house journals for the same purpose.⁸ So, also, land-tax assessments have been held admissible to prove the assessment of the taxes upon the individuals and for the property therein mentioned;⁹ and in Ireland, poor law valuations have been received as evidence of value.¹⁰ So the courts have admitted the books of the Sick and Hurt Office, to prove the death of a seaman, and the time of such death;¹¹ and the registries of public prisons, or

¹ Supra, § 120; infra, § 649.

² Greenleaf's Ev. § 483; Taylor's Ev. § 1429. Supra, § 120.

³ See infra, § 649 *et seq.*; Atkins v. Halton, 2 Anst. 387; Armstrong v. Hewett, 4 Price, 216; Pulley v. Hil-ton, 12 Price, 625; Croughten v. Blake, 12 M. & W. 208; Kyburg v. Perkins, 6 Cal. 674; Haile v. Palmer, 5 Mo. 403. As to baptismal registries, see infra, § 653.

⁴ Tomkins v. Atty. Gen. 1 Dow, 404.

⁵ Marriage v. Lawrence, 3 B. & A. 142; R. v. Mothersell, 1 Str. 93; Thetford's case, 12 Vin. Abr. 90, pl. 16; Warriner v. Giles, 2 Str. 954. As to other corporation books, see infra, § 661.

⁶ Reed v. Lamb, 29 L. J. Ex. 452; 6 H. & N. 75, S. C. See Mead v.

Robinson, Willes, 422; R. v. Hughes, cited Ibid.; R. v. Davis, 2 Str. 1048.

⁷ The Catherina Maria, 1 Law Rep. Adm. & Ecc. 53. See De Armond v. Neasmith, 32 Mich. 231.

⁸ The Maria das Dorias, 32 L. J. Pr., Mat. & Adm. 163, per Dr. Lushington; B. & Lush. Adm. R. 27, S. C. *nom.* The Maria das Dores.

⁹ Doe v. Seaton, 2 A. & E. 170, 178; Doe v. Arkwright, Ibid. 182, n.; 5 C. & P. 575; 1 N. & M. 731, S. C.; Doe v. Cartwright, Ry. & M. 62; 1 C. & P. 218, S. C. See Ronkendorff v. Taylor, 4 Pet. 349, 360.

¹⁰ Swift v. McTiernan, 11 Ir. Eq. R. 602, per Brady, Ch.; Welland v. Ld. Middleton, Ibid. 603, per Sugden, Ch.

¹¹ Wallace v. Cook, 5 Esp. 117.

penitentiaries, to prove the stay of a prisoner,¹ though not to prove the cause of commitment.² An entry in a vestry-book, stating the election of a treasurer of the parish at a vestry duly held in pursuance of notice, is evidence of the election, and of its regularity.³ On the other hand, on the ground that the document was not kept under statute for public use, admission has been refused to a report stating the burden of a foreign ship, and the number of the crew, which was made by the master to the authorities of the custom-house, and was there filed, when the report was tendered in evidence as a public document to prove the burden of the ship; and also to a certificate filed at the custom-house, which was signed by a party who certified that he had measured the vessel, and stated the amount of the tonnage.⁴ So, on the same reasoning, Lloyd's Register of Shipping has been rejected;⁵ and so has a registry of attendance kept by the medical officer of a union as a check upon himself;⁶ and so the book called Arms and Descents of the Nobility, E., 16, though produced from the Heralds' College.⁷ Admittance has also been refused to a registry produced from the office of the secretary of bankrupts, in which entries were made of the allowance of certificates, for the reason that the book was not kept under the authority of any official order, nor were the entries made in the course of official duty.⁸

On the same reasoning, it has been held in a Maryland case that police records, kept by the detective police of a city, in order to show charges made against particular individuals, cannot be put in evidence by a party so accused, in order to show

¹ *Salte v. Thomas*, 3 B. & P. 188; *R. v. Aikles*, 1 Lea. 391.

² *Ibid.*

³ *R. v. Martin*, 2 Camp. 100; *Hartley v. Cook*, 5 C. & P. 441. See, also, *Price v. Littlewood*, 3 Camp. 288; though it is otherwise with entries not made in discharge of any public duty. *Cooke v. Banks*, 2 C. & P. 478.

⁴ *Huntley v. Donovan*, 15 Q. B. 96.

⁵ *Freeman v. Baker*, 5 C. & P. 482. See *Kerr v. Shedden*, 4 C. & P. 531, n. a. In *Bain v. Case*, 3 C. & P.

496, this book was admitted, to prove that the coast of Peru was in a state of blockade at a particular time; and in *Abel v. Poits*, 3 Esp. 242, it was received as evidence of the capture of a vessel. See, also, *Richardson v. Mellish*, 2 Bing. 241, per Best, C. J.

⁶ *Merrick v. Wakley*, 8 A. & E. 170.

⁷ *Shrewsbury Peer*, 7 H. of L. Cas. 24.

⁸ *Henry v. Leigh*, 3 Camp. 499.

the injury done him by being charged with theft; such records not being prescribed by statute, nor in any way traceable to the party sued for the injury.¹

But in all such cases it is essential to remember, that however inadmissible entries may be *per se*, or however incompetent may be the book in which they are made, they may become evidence when made by a deceased person against his interest,² or in discharge of a business duty.³

§ 640. In this country we have numerous cases tending to show that official records, duly kept by public administrative officers, are, as to third parties, *prima facie* evidence of the facts entered duly by such officers in the course of their duties, as well as of documents recorded.⁴ Even a public officer's entry, when in the regular discharge of

¹ Garvey v. Wayson, 42 Md. 187.

"The fact that, pursuant to the regular custom of the detective police department, the appellant's name was entered upon the detective police annals of the city, and open to the inspection and use of the police force, as tending to show the publicity of the charge made against him, and the consequent injury to him, was clearly not admissible evidence against the appellee, unless there was some law requiring such a record to be kept, or unless the appellant was prepared to show by proof that the appellee knew that the name of the appellant would be so entered as the consequence of the charge of theft being preferred against him. The acts of the detective force were certainly not admissible for the purpose of inflaming the damages against the appellee, without further proving that there was some law, of which the appellee would be bound to take notice, requiring an entry on their books of the name of any party against whom a criminal charge might be preferred, or that it was their custom to make such entry, and that the appellee had a knowledge of that fact.

There was no error in the ruling in this exception." Garvey v. Wayson, 42 Md. 187, Grason, J.

² Supra, § 226.

³ Supra, § 238.

⁴ Cases cited in § 639; U. S. v. Howland, 2 Cranch C. C. 508; U. S. v. Kuhn, 4 Cranch C. C. 401; Wakefield v. Alton, 3 N. H. 378; Hayward v. Bath, 38 N. H. 179; Gilbert v. New Haven, 40 Conn. 102; Thompson v. Chase, 2 Grant (Penn.), 367; Chapman v. Herrold, 58 Penn. St. 106; Erickson v. Smith, 2 Abb. (N. Y.) App. Dec. 64; Taliaferro v. Pryor, 12 Grat. 277; Westerhaven v. Clive, 5 Ohio, 136; Dixon v. Doe, 5 Blackf. 106; Daniels v. Stone, 6 Blackf. 451; McNeely v. Rucker, 6 Blackf. 391; Holcroft v. Halbert, 16 Ind. 256; St. Charles v. O'Malley, 18 Ill. 407; Hiner v. People, 34 Ill. 297; Weisbrod v. Chicago R. R. Co. 21 Wisc. 602; Lumsden v. Cross, 10 Wisc. 282; Soulard v. Clark, 19 Mo. 570; Kyburg v. Perkins, 6 Cal. 674; Pralus v. Pacific Co. 35 Cal. 30; Conner v. McPhee, 1 Mon. T. 73; Stroud v. Springfield, 28 Tex. 649. See supra, § 111.

his duties, in a book he is by law required to keep, is *primâ facie* evidence in his own favor when the performance of the acts registered is at issue.¹

This attribute of admissibility has been applied to the registry of incumbrances in the proper records;² to the records of a land office;³ to the blotters of a land office;⁴ to the plats recorded in a surveyor general's office;⁵ to the public records of a city showing authority to widen streets;⁶ to the book of accounts kept in the office of an alcade;⁷ to the alcade's book of grants;⁸ to the record of a court-martial;⁹ to the record of registered letters in the post-office;¹⁰ to the registry of tax sales by county commissioners;¹¹ to the registry of tax sales by a county treasurer;¹² to the record of redemption of taxes in an auditor's office;¹³ to the record of county supervisors;¹⁴ to the record of the assessment of property by selectmen;¹⁵ to the returns of a deceased person of his property to the receiver of taxes;¹⁶ though as to the value of taxed property the tax books are not themselves evidence.¹⁷ Even the registries of weather kept by public institutions have been received, as will be presently seen, in order to prove the weather at certain distant periods.¹⁸ It should at the same time be remembered that public acts of this class cannot be put in evidence to affect strangers dispositively.¹⁹

§ 641. The same authority is assigned the records of town meetings;²⁰ and to the books of the selectmen of a town, prov-

¹ Bissell v. Hamblin, 6 Duer, 512.

² Metcalf v. Munson, 10 Allen, 491; 329.
Conway v. Case, 22 Ill. 127. Supra, § 111.

³ Galt v. Galloway, 4 Pet. 332; Beauvais v. Wall, 14 La. An. 199.

⁴ Strimpfler v. Roberts, 18 Penn. St. 283.

⁵ Ott v. Soulard, 9 Mo. 581; Smith v. Hughes, 23 Tex. 248.

⁶ Barker v. Fogg, 34 Me. 392.

⁷ Kyburg v. Perkins, 6 Cal. 674.

⁸ Downer v. Smith, 24 Cal. 114.

⁹ Brooks v. Daniels, 22 Pick. 498.

¹⁰ Gurney v. Howe, 9 Gray, 404.

¹¹ Dikeman v. Parrish, 6 Penn. St. 210; Cuttle v. Brockway, 24 Penn. St. 145.

¹² Groesbeck v. Seeley, 13 Mich.

329.

¹³ Lane v. Sharpe, 3 Scam. 566.

¹⁴ People v. Bircham, 12 Cal. 50.

¹⁵ Pittsfield v. Barnstead, 40 N. H. 477. See supra, § 639.

¹⁶ Lynch v. Lively, 32 Ga. 575. See supra, § 639.

¹⁷ Lockhart v. Woods, 38 Ala. 631. See supra, § 639.

¹⁸ See infra, § 647.

¹⁹ See supra, § 176.

²⁰ Cass v. Bellows, 31 N. H. 501; Saxton v. Nimms, 14 Mass. 315; Thayer v. Stearns, 1 Pick. 109; Gilmore v. Holt, 4 Pick. 258; Bridgewater v. W. Bridgewater, 7 Pick. 191; Waters v. Gilbert, 2 Cush. 27; Isbell

ing payments in support of a pauper.¹ But the reports of a town committee, as to a highway, and the votes of the town as to such highway, are not admissible in an action against the town for damages produced by a defect in the highway, to prove an admission of defectiveness by the town.²

§ 642. When properly made, the record includes all its usual incidents.³ A receipt on a record, for instance, becomes part of the record.⁴ Such a record is the primary evidence of the proceedings to which it relates, being in this respect treated as other records, only to be proved by parol in cases of loss or destruction, though open to parol explanation, so far as concerns ambiguities and matters collateral.⁵

§ 643. But a record, to be thus admitted, must be of a class authorized by the statute or by common law,⁶ though a special authorization by name is not necessary.⁷ It must be kept by the proper officer.⁸ Records relating to real estate must be recorded in the office *rei sitae* and

v. R. R. 25 Conn. 556; *People v. Zeyst*, 23 N. Y. 140; *Sanborn v. School Dist.* 12 Minn. 17. Minn. 17; *Monaghan v. School Dist.* 38 Wisc. 101.

¹ *Thornton v. Campton*, 18 N. H. 20. And so as to school-board minutes. The records of a school-district meeting are the best evidence of the business transacted thereat; and there is no error in rejecting oral evidence of the business transacted at such a meeting. *Monaghan v. School District*, 38 Wisc. 101.

² *Collins v. Dorchester*, 6 Cush. 396; *Wheeler v. Framingham*, 12 Cush. 287.

³ *Supra*, § 619.

⁴ See *infra*, §§ 830, 832; *Lothrop v. Blake*, 3 Penn. St. 483; *Lawrence Co. v. Dunkle*, 35 Mo. 395.

⁵ See *infra*, §§ 982, 986, 991; *Longley v. Vose*, 27 Me. 179; *Bishop v. Cone*, 3 N. H. 513; *Cabot v. Britt*, 36 Vt. 349; *Benninghoof v. Finney*, 22 Ind. 101; *Lane v. Sharpe*, 3 Scam. 566; *Sanborn v. School District*, 12

⁶ *Supra*, § 639; *Wetmore v. U. S.* 10 Pet. 647; *State v. Berry*, 21 Me. 169; *Hardy v. Houston*, 2 N. H. 309; *Gurney v. Howe*, 9 Gray, 404; *People v. Denison*, 17 Wend. 312; *Bouchaud v. Dias*, 3 Denio, 238; *Shortz v. Unangst* 3 Watts & S. 45; *Fitler v. Shotwell*, 7 Watts & S. 14; *Foresman v. Marsh*, 6 Blackf. 286; *Smith v. Lawrence*, 12 Mich. 431; *Com. v. Rhodes*, 1 Dana, 595; *Haile v. Palmer*, 5 Mo. 403; *Trammell v. Thurmond*, 17 Ark. 203.

⁷ *Strimpfler v. Roberts*, 18 Penn. St. 283; *Groesbeck v. Seeley*, 13 Mich. 329; *Highsmith v. State*, 25 Tex. Supp. 137; *Hatchett v. Conner*, 30 Tex. 104.

⁸ *Supra*, § 639; *U. S. v. Kuhn*, 4 Cranch C. C. 401; *Waters v. Gilbert*, 2 Cush. 27; *Allen v. Vincennes*, 25 Ind. 531.

by the proper local officer.¹ Thus an alcade's book must bear the signatures of the alcade and clerk for the time being, and be kept in the proper county.² It has been held in Massachusetts, that where it was proved by a witness that a book of records of the proprietors of certain common lands came to him from his grandfather, there being no evidence of the appointment of a clerk to keep the records, and no place appointed by law for their keeping, such book could be admitted in evidence, the presumption from lapse of time being that the witness was their proper custodian.³ A book where mining claims are recorded according to miners' rules, as established in a mining district, may be received, it has been held in California, to prove compliance with the rules requiring the recording of transfers.⁴

§ 644. To entitle a record or registry to admission, to prove pertinent facts, it must not only come from the proper officer, and be taken from the proper custody,⁵ but it must be properly attested and identified.⁶ An inevitable break in such custody may be explained by parol proof.⁷ It must be complete in itself; and one portion of it cannot be received without the entire relevant context.⁸

§ 645. A registry, also, as well as a judicial record, must on its face indicate accuracy.⁹ The custom being to engross registries and records in ink, pencil memoranda of entries will be regarded as merely provisional. Thus,

Such record must be identified and be complete.

It must indicate accuracy.

¹ Royce v. Hurd, 24 Vt. 620; Donaldson v. Phillips, 18 Penn. St. 170; and cases cited Whart. Conf. of Laws, § 372. See supra, § 111.

² Downer v. Smith, 24 Cal. 114; Secrest v. Jones, 21 Tex. 121.

³ Tolman v. Emerson, 4 Pick. 160. As to the question of the proper custodian of a document, see fully supra, §§ 194, 197.

⁴ Attwood v. Fricot, 17 Cal. 37. See McGarrity v. Byington, 12 Cal. 426; English v. Johnson, 17 Cal. 107.

⁵ See supra, § 197.

⁶ Foxcroft v. Crooker, 40 Me. 308; Bean v. Smith, 20 N. H. 461; Tolman

v. Emerson, 4 Pick. 160; Welles v. Battelle, 11 Mass. 477; Franey v. Miller, 11 Penn. St. 434; Downer v. Smith, 24 Cal. 114; Sanborn v. School Dist. 12 Minn. 17.

⁷ Herndon v. Casiano, 7 Tex. 322. See supra, § 194 *et seq.*

⁸ Supra, § 619. See infra, § 828, 830; Morrill v. Foster, 33 N. H. 379; Miles v. Wingate, 6 Ind. 458; Loper v. State, 3 How. (Miss.) 429.

⁹ Monumoi Beach v. Rogers, 1 Mass. 159; Sprague v. Bailey, 19 Pick. 436; Kinney v. Doe, 8 Blackf. 350; Ewbanks v. Ashley, 36 Ill. 177; Walls v. McGee, 4 Harr. (Del.) 108. See infra, § 982.

pencil memoranda on records have been held inadmissible.¹ But defects of form, in recording of ancient deeds, may be explained by parol.² And to all cases the ordinary presumption of regularity will be applied.³

§ 646. The rule establishing the admissibility of records of this class has been held not to extend to cases where such records are themselves secondary evidence.⁴ Thus, the army register of the United States is not evidence of the pay of officers of the army, such pay being determined by statute.⁵ So a tax duplicate is not a record that proves itself,⁶ but its authority, even if it be admissible, must first be established by parol.⁷ The rule which allows lost records of courts to be supplied by parol applies to records kept by public administrative officers.⁸

§ 647. We have already seen⁹ that a registry or record, kept for public use, by an officer authorized by statute or by common law to keep such document, is admissible evidence of pertinent facts it records. It may, however, happen that a registry of current events kept in a public voluntary institution may be the only evidence attainable of a fact in litigation. If so, on the principle that the best evidence is always admissible evidence,¹⁰ such evidence should be admitted as *primâ facie* proof. In accordance with this view, a record of weather kept at a public institution has been held admissible to prove the temperature on a day as to which witnesses could not accurately speak.¹¹ Such entries,

¹ Meserve v. Hicks, 24 N. H. 295.
See supra, § 616.

² Infra, § 1307-11. Booge v. Parsons, 21 Vt. 57; Bettison v. Budd, 21 Ark. 578.

³ R. v. Catesby, 2 B. & C. 814; R. v. Whitechurch, 7 B. & C. 573; R. v. Upton Gray, 10 B. & C. 804; Nelson v. Moon, 3 McLean, 319; Sumner v. Sebec, 3 Greenl. 223; Isbell v. R. R. 25 Conn. 556; Farr v. Swan, 2 Penn. St. 245; Byington v. Allen, 11 Iowa, 3. See fully infra, § 1314.

⁴ See supra, §§ 60-77. Watson v. Ins. Co. 2 Wash. C. C. 152; Stratford v. Sanford, 9 Conn. 275.

⁵ Wetmore v. U. S. 10 Pet. 647.

⁶ State v. Smith, 30 N. J. L. 449.

⁷ See supra, § 77 *et seq.*

⁸ Supra, § 135. Norris v. Russell, 5 Cal. 249.

⁹ Supra, §§ 640-3.

¹⁰ See supra, §§ 72, 170-2.

¹¹ De Armond v. Neasmith, 32 Mich. 231. See The Catharine Maria, L. R. 1 Ad. & Ec. 53; and see supra, §§ 639-640.

"The plaintiff's counsel offered in evidence a record of the weather kept at the insane asylum for a number of years, for the purpose of showing the temperature of the weather in March,

however, must be subjected to the same tests, as to genuineness and primariness, as will presently be noticed in respect to parish records.

§ 648. Under certain acts of Congress, log-books may be evidence of the facts they state. Their admissibility, however, is limited to the points the statutes designate;¹ and they must be identified as duly kept.² But independent of the statutory provisions, a log-book is admissible when kept by a deceased officer, when in the performance of his duties,³ or by an officer whose attendance is unobtainable.⁴

Log-book
admissible
under act
of Con-
gress.

V. RECORDS AND REGISTRIES OF BIRTH, MARRIAGE, AND DEATH.

§ 649. In all states subject to the Roman law, with the exception of France, parish records are regarded as primary evidence of births, marriages, and deaths. Ecclesiastics, it is argued, are specially charged with the duty of keeping such records, and may be expected to keep them conscientiously. From a period as remote as the third century, baptismal registries have been kept by the parish clergy, and have been regarded as *primâ facie* proof of the facts which they certify. Among the consequences of the Reformation may be enumerated an increased vigilance in guarding this class of records. The reformed churches, acting in most part in concert with the state, established stringent rules for the direction in this respect of the parish minister, who was at the same time subjected to civil responsibility for error in the making up of his

Parish rec-
ords ad-
missible by
Roman and
canon law.

1868. We think the record was admissible, and comes within the principle of *Sisson v. Cleveland & Toledo R. R. Co.* 14 Mich. 497." *De Armond v. Neasmith*, 32 Mich. 231, 233.

¹ *U. S. v. Gilbert*, 2 Sumn. 19; *U. S. v. Sharp*, Pet. C. C. 418.

² *U. S. v. Mitchell*, 2 Wash. C. C. 478.

³ See *supra*, § 238.

⁴ See *D'Israeli v. Jewett*, 1 Esp. 427; *Barber v. Holmes*, 3 Esp. 190; *Watson v. King*, 4 Camp. 275; *R. v. Fitzgerald*, 1 Leach, 20; *R. v. Rhodes*,

Ibid. 24; and see, also, *Heathcote's Divorce*, 1 Macq. S. Cas. II. of L. 277, where a log-book, being produced to prove that an officer of the ship was at a certain place on a given time, the house of lords required evidence of that fact.

The Sick and Hurt Books, kept under act of parliament, are evidence to show the vessel to which a sailor belonged, and the amount of wages due to him. *R. v. Fitzgerald*, 1 Leach, 20; *R. v. Rhodes*, *Ibid.* 24.

records, and the Council of Trent adopted special measures to effect the same end.¹ By the action of this council, it must be remembered, as bearing on the form of Roman Catholic registries, it is sufficient if the names of the child and of the god-parents are inscribed. In many dioceses, however, more minute regulations have been made, it being provided that the time of the birth, the names and the date and place of the marriage of the parents, should be specified, and that these details should be certified to by the father and god-parents. The regulations of the several Protestant churches present in this respect much diversity, sometimes prescribing that merely the baptism should be recorded, with the parents' names, sometimes requiring the date and place of the parents' marriage to be given.

§ 650. *Parochial registries* of death were made at a very early period of the church, and are prescribed, in part by general councils, in part by particular synods, in part by local territorial laws.

§ 651. *Parochial registries of marriages* are of later origin, as marriages without ecclesiastical interposition frequently took place prior to the Reformation and the Council of Trent; and even when the benediction of a priest was given, this, according to the better opinion, did not go to the essence of the institution.² The Council of Trent, however, established a limitation which it is important to keep in mind when we examine the marriage registries of Roman Catholic parishes. By that council it was ordained,³ “habeat parochus librum, in quo conjugum et testium nomina diemque et locum contracti matrimonii describat, quem diligenter apud se custodiat.” By particular councils further details have been exacted, it being required that the priest should register the names of the parents of the persons married, the conditions of the latter as to prior marriages; the time of publishing the banns, when such are imposed by law; and the nature of any dispensations which may have been issued to facilitate the marriage. By several Protestant communions similar duties have been imposed.⁴

¹ See Concil. Trident. sess. 24, cap. 2.

² Concil. Trident. sess. 24, cap. 1, de reformat.

³ See Wharton's Conf. of Laws, § 169; and also App. B.

⁴ See Boehmer, Jus paroch. sect. 4, cap. iii. § 8.

§ 652. The authority of such registries as evidence, in the modern Roman law, is, by the better opinion, solely the result of usage; and the same usage, according to the same law, has sanctioned the reception in evidence of copies of such books, duly certified by the proper parish authority. But for such evidence another reason can be given. In many cases (*e. g.* those of legitimacy), it is the best if not the only evidence that can be obtained, and in such cases it should be received for what it is logically worth. Eminently is this the case as to periods and places where the state gives the making of such registries exclusively to the ecclesiastical officers of a parish; and where such officers, therefore, feel themselves bound to keep their records with scrupulous accuracy and fairness. The Roman law, as now settled, however,¹ makes it essential to the admission of such records: first, that the books should be officially kept, in the manner prescribed by law; secondly, that the entries should have been made by the priest or pastor himself, or that each entry should be signed by him. If there is no priest or pastor in charge at the time of the entry, then the authority of the person making the entry must be specially proved. Thirdly, the authority of such entries is dependent upon the disinterestedness of the person by whom they are made; and if the entry be made by a person who thereby sustains any personal claims of his own, this discredits the entry.

§ 653. So far as concerns the law of England and the United States, an official registry is admissible, when kept in conformity with law, and, when duly authenticated, to prove such facts as the law requires to be registered. It follows that whenever a baptismal, marriage, or burial registry is kept in accordance with statute, such registry, being duly authenticated, is admissible to prove the facts which are within the statutory authority.² Even though there

When duly kept, such registries are admissible to prove facts.

¹ Weiske, *Rechtslex. in loco.*

Jackson v. People, 2 Scam. 232; *Glenn*

² *Gilb. Ev.* (3d ed.) 77; *Wißen v.*

v. Glenn, 47 Ala. 204.

Law, 3 Stark. R. 63; *May v. May*, 2 Stra. 1073; *Draycott v. Talbot*, 3 Bro. P. C. 564; *Doe v. Barnes*, 1 M. & Rob. 389. See *State v. Wallace*, 9 N. H. 515; *State v. Horn*, 43 Vt. 20;

"Parish registers are in the nature of records, and need not be produced, or proved by subscribing witnesses." Per Lord Mansfield, *C. J.*, *Boit v. Barlow*, Doug. 172. They are, there-

be no enabling statute, there is much strength in the position that as the canon law, so far as concerns the law of marriage, is part of Anglo-American common law,¹ and as parish records are public records by the canon law, they are to be regarded by us as public records, and hence admissible in evidence, by our own common law.² Yet as this position is open to doubt, and is in conflict with English rulings excluding registries by dissenting religious bodies, unless supported by proof *aliunde* as to their accuracy;³ it is proper, in order to authenticate the facts stated in such records, to call the person by whom they were made, if living, to testify to their accuracy, or if he be dead, to prove that the entries were made by him in discharge of his duties. It should at the same time be remembered, that a copy of a foreign registry will be admitted wherever such registry is kept in accordance with the local law.⁴

fore, provable under 14 & 15 Vict. c. 19. *Re Hall's Estate*, 9 Hare, App. xvi.

A burial entry is evidence to prove death. *Lewis v. Marshall*, 5 Peters, 470.

¹ See Wharton's *Conf. of Laws* § 169 *et seq.*

² *Steyner v. Droitwich*, 1 Salk. 281; *S. C.* 12 Mod. 86; *Holt*, 290; *Chouteau v. Chevalier*, 1 Mo. 243; *Kings-ton v. Lesley*, 10 S. & R. 383; *Am. Life & Trust Co. v. Rosenagle*, 77 Penn. St. 507; and see argument of court in *Kennedy v. Doyle*, cited *infra*.

³ *Birt v. Barlow*, 1 Doug. 191; *Taylor, ex parte*, 1 Jac. & Walk. 483; *S. C.* 3 Man. & Ry. 430, n.; *Whittuck v. Waters*, 4 C. & P. 375; *D'Aglié v. Fryer*, 13 L. J. N. S. Ch. 398; *Doe v. Andrews*, 15 Q. B. 759; *Athlone's Claim*, 8 Cl. & F. 262; *Coode v. Coode*, 1 Curt. Ec. L. 764.

So as to the Fleet records, *Reed v. Passer*, 1 Esp. 213; *S. C.* Pea. R. 303; *Doe v. Gutacre*, 8 C. & P. 478.

So as to Irish registers. *Stockbridge v. Quicke*, 3 C. & K. 305.

So as to Jewish registries. *Davis v. Lloyd*, 1 C. & K. 275.

⁴ *Perth Peer*. 2 H. of L. Cas. 865, 873, 874, 876, 877; *Abbott v. Abbott & Godoy*, 29 L. J. Pr. & Mat. 57; 4 Swab. & Trist. 254, *S. C.*; *Am. Life & Trust Co. v. Rosenagle*, 77 Penn. State, cited *infra*, § 658. In the absence of such proof, a copy of a baptismal register in Guernsey has been rejected in England. *Huet v. Le Mesurier*, 1 Cox Ch. R. 275. This rejection, according to Dr. Lushington, was "because it did not appear by what authority the register was kept. Supposing it had been proved that Guernsey was part of the diocese of Winchester, which it is, and by ancient custom a register was required to be kept there, different considerations might have applied to the case. . . . I am of opinion that there is no ground of distinction, supposing the register had been kept by order of a competent authority, between registers kept in Guernsey and in this country." *Coode v. Coode*, 1 Curt. 766.

§ 654. We have already seen that entries kept by a deceased person in the course of his business are admissible as *primâ facie* proof of all facts relating to such business, in all cases in which the entries bear genuineness on their face, and were made at or near the time of the events they register.¹ Independently of statutory prescriptions, the entries regularly made in his own books, or his official books, by a clergyman, or by the recording officer of a parish, or by the proper functionary of a religious society, are, after his decease, evidence of all facts which it was his duty officially to enter.²

Admissible also, when kept by deceased persons in the course of their business.

So the English courts have rejected a copy of the marriage register kept in the Swedish ambassador's chapel at Paris; *Leader v. Barry*, 1 Esp. 353; and a copy of the register of the British ambassador's chapel at the same place. *Athlone Peerage*, 8 Cl. & F. 362. See, also, *Dufferin Peer.* 2 H. of L. Cas. 47.

They have, however, received an examined copy of a marriage register in Barbadoes, it appearing that by the law of that colony such register was kept. *Coode v. Coode*, 1 Curt. 755, 766, 767, per Dr. Lushington.

A book found in the hands of a town clerk, purporting to be a record of the births and marriages in a town, though without title or attestation, has been received in evidence as *primâ facie* proof in a civil issue. *Sumner v. Sebec*, 3 Greenl. 223. See *Jacobs v. Gilliam*, 3 Murph. (N. C.) 47.

¹ *Supra*, § 238.

² The cases on this topic are fully presented in an opinion by Gray, J., in *Kennedy v. Doyle*, 10 Allen, 162, from which we extract the following: "The English judges, adhering to the principle of admitting in evidence as public documents those registers only which the law required to be kept, have considered all others as mere private memoranda, and have refused

to admit registers regularly kept by dissenters unless supported by the testimony of the person keeping them or other witnesses. *Birt v. Barlow*, 1 Doug. 171; *Newham v. Raithby*, 1 Phillim. R. 315; *Ex parte Taylor*, 1 Jac. & Walk. 483; *S. C.* 3 Man. & Ry. 430, note; *Doe v. Bray*, 8 B. & C. 813; *S. C.* 3 Man. & Ry. 428; *Whittuck v. Waters*, 4 C. & P. 375. Vice Chancellor Shadwell refused even to admit an entry in the register of the Roman Catholic chapel of the Sardinian ambassador in London as evidence of the baptism of the ambassador's son. *D'Aglié v. Fryer*, 13 Law Journal N. S. Ch. 398. 'The principle on which entries in a register are admitted,' said Mr. Justice Erle in a recent case, 'depends upon the public duty of the person who keeps the register to make such entries in it, after satisfying himself of their truth.' *Doe v. Andrews*, 15 Q. B. 759. See, also, *Conway v. Beazley*, 3 Hagg. Eccl. 651; *Athlone's Claim*, 8 Clark & Fin. 262; *Earldom of Perth*, 2 H. L. Cas. 873, 874; *Coode v. Coode*, 1 Curt. Eccl. 761-767; *Hubback on Succession*, 161, 365, 366, 514." . . .

"Lord Chancellor Plunket repeatedly admitted the books of a Roman Catholic chapel in Dublin, made by

§ 655. A registry of baptisms, however, has been ruled not to be proof of the alleged time of the child's birth, but only that he was born at the date of the baptism;¹ though it seems that it may be used, with other indicatory evidence, to show the place of birth,² to indicate age,³ and to infer illegitimacy.⁴ In Massachusetts it

Registry only proves facts that it was the writer's duty to record.

Roman Catholic priests whose deaths and handwriting were proved, as evidence of marriages and baptisms; and on the last occasion, after argument, gave this reason for their admission: 'They are the entries of deceased persons, made in the exercise of their vocation, contemporaneously with the events themselves and without any interest or intention to mislead.' *O'Connor v. Malone*, 6 Clark & Fin. 576, 577; *Malone v. L'Estrange*, 2 Irish Eq. R. 16. In some modern English cases, the judges have shown an inclination to limit the admission of entries made in the course of business; and to rest the earlier decisions, more than those who made them did, on the hypothesis that the entries were against the interest of the person making them. This tendency appears very strongly in the judgment of Lord Denman. *Chambers v. Bernasconi*, 1 Cr., Mees. & R. 347; *S. C.* 4 Tyrwh. 531; *Rex v. Cope*, 9 C. & P. 727.

"It has been repeatedly held in this commonwealth that the book of a bank messenger or a notary public, kept in the usual course of business, though not required by law, is competent evidence after his death. *Welsh v. Barrett*, 15 Mass. 380; *Porter v. Judson*, 1 Gray, 175. Similar decisions have been made by the supreme court of the United States, and by other American courts of authority. *Nicholls v. Webb*, 8 Wheat. 326; *Gale v. Norris*, 2 McLean, 471; *Augusta v. Winsor*, above cited; *Sheldon v. Benham*, 4 Hill (N. Y.), 131; *Nourse v. McCay*, 2 Rawle, 70.

"In the case before us the book was kept by the deceased priest in the usual course of his office, and was produced from the custody of his successor; the entry is in his own handwriting, and appears to have been made contemporaneously with the performance of the rite, long before any controversy had arisen, with no inducement to misstate, and no interest except to perform his official duty. The addition of a memorandum, that he had been paid a fee for the ceremony, could not have added anything to the competency, the credibility, or the weight of the record as evidence of the fact. An entry made in the performance of a religious duty is certainly of no less value than one made by a clerk, messenger, or notary, an attorney or solicitor, or a physician, in the course of his secular occupation." *Gray, J., Kennedy v. Doyle*, 10 Allen, 165.

¹ *R. v. Clapham*, 4 C. & P. 29; *Burghart v. Angerstein*, 6 C. & P. 690; *Wißen v. Law*, 3 Stark. R. 63; *Morrissey v. Ferry Co.* 47 Mo. 521; though see *Wintle*, in re, L. R. 9 Eq. 373.

² *R. v. North Petherton*, 5 B. & C. 508. See *Clark v. Trinity Church*, 5 W. & S. 266; *R. v. Lubbenham*, 5 B. & Ad. 968.

³ *R. v. Weaver*, L. R. 2 C. C. R. 85; *Whitcher v. McLaughlin*, 115 Mass. 168.

⁴ *Cope v. Cope*, 1 M. & Rob. 271. The registry of baptism is no proof of the child's legitimacy. *Blackburn v. Crawfords*, 3 Wall. 175.

has been accepted, cumulatively with other evidence, to prove the date of birth.¹ Where, however, the statute provides that *births* shall be registered, then the registry is *prima facie* proof of the birth and its date.² The identity of the person referred to, it need scarcely be added, must be proved *aliunde*.³ The marriage registry proves not only the fact of marriage but the time of celebration.⁴ The mode of proving marriage will be found more fully discussed in a prior chapter.⁵

§ 656. To make entries in such a registry admissible, however, they must be made at first hand.⁶ Thus, a minister's entry of a baptism, administered by another person before his own official service began, the information of the baptism having been given him by the clerk, has been ruled inadmissible.⁷ Yet if an entry be of a fact occurring within the certifying party's term of office, it is not fatal that the act certified to was done by a third person, if such third person could be considered as in any sense the agent of the incumbent who certifies. Thus an entry of a burial in a parish book, kept in the proper depository, has been admitted, though the incumbent did not himself attend the burial, and made the entry on the report of the person officiating.⁸ When the entry is made by the proper officer, a short delay in entering is not fatal.⁹ It should appear that the original is in the proper custody,¹⁰ which, in England, in the case of marriage, baptismal, and death registers, is with the incumbent, and not the parish clerk.¹¹

§ 657. At common law, as we have already seen, a certificate from a party, even when acting officially, that he has done a particular thing, is inadmissible to prove such thing. If living, he must be called to prove the fact;

Entries must be first hand and prompt.

Certificate at common law inadmissible.

¹ *Whitcher v. McLaughlin*, 115 Mass. 167.

² *Derby v. Salem*, 30 Vt. 722; *Stoever v. Whitman*, 6 Binney, 416. See *Carskadden v. Poorman*, 10 Watts, 82.

³ *Morrissey v. Ferry Co.* 47 Mo. 521. Identity must be shown extrinsically, in the case of a marriage, either by proving the handwriting of the parties, or by calling a witness who was present at the marriage; *Birt v. Barlow*, Doug. 272; but the handwriting may be spoken to without producing

the register. *Sayer v. Glossop*, 2 Exch. 409. See fully supra, § 77 *et seq.*

⁴ *Doe v. Barnes*, 1 M. & Rob. 386; *R. v. Hawes*, 1 Den. C. C. 270.

⁵ Supra, §§ 84, 85.

⁶ See supra, § 246.

⁷ *Doe v. Bray*, 8 B. & C. 813; *Walker v. Wingfield*, 18 Ves. 443.

⁸ *Doe v. Andrews*, 1 M. & Rob. 386.

⁹ *Derby v. Salem*, 30 Vt. 722.

¹⁰ Supra, § 194 *et seq.*

¹¹ *Doe v. Fowler*, 19 L. J. Q. B. 151.

if dead, it may be proved by his official entries.¹ This rule applies to certificates of marriage and of birth. Thus the certificate of a clergyman, given sixteen years after a marriage, that he had married the husband to one claiming to be a prior wife, cannot, by itself, be received to establish such prior marriage, there being no record of such marriage in the register of the church.² Under the Connecticut statute, however, it has been intimated that the certificate of baptism, by a duly authorized minister, is conclusive;³ and such seems to be the rule under the Maine statute.⁴ Generally, when authorized by statute, such certificates become only *primâ facie* proof of the facts they duly set forth.⁵

§ 658. Unless there be an enabling statute, copies are inadmissible when the original can be had. Thus, a sworn copy of a marriage contract, executed in the presence of the lieutenant governor and Spanish commandant of Upper Louisiana, with a certificate of the commandant that the original was deposited in the archives of the territory, is not admissible to prove the marriage.⁶ Yet when the original cannot be had an exemplification is admissible, for the reason it is the best evidence attainable.⁷ Thus in Pennsylvania, a certified copy of an English register kept by the Society of Friends (or Quakers) has been received.⁸ So where a pastor of a church in a foreign country testified that his church records of marriages and births had been kept according to the laws of the country, and he was the proper custodian of them, and that they were received by him from his predecessor, it was held, that extracts from the records giving the genealogy of a family, sworn by him to be correct, were evidence in a question of identity.⁹

§ 659. Where a statute requires the return of a certificate of marriage to be made by the officiating minister to the county

¹ See *supra*, § 120.

⁶ *Chouteau v. Chevalier*, 1 Mo. 343.

² *Gaines v. Relf*, 2 How. (U. S.) 619.

See *State v. Dooris*, 40 Conn. 145.

⁸ *Huntly v. Comstock*, 2 Root, 99.

⁷ *Alivon v. Furnival*, 1 C., M. & R. 277; *Boyle v. Wiseman*, 10 Ex. R. 647; *Quilter v. Jones*, 14 C. B. (N. S.) 747; *Coode v. Coode*, 1 Curtis, 765. *Supra*, § 130.

⁴ *Dole v. Allen*, 4 Greenl. 527.

⁵ *Derby v. Salem*, 30 Vt. 722; *Jones's Succession*, 12 La. An. 397. See *Beates v. Retallick*, 23 Penn. St. 288.

⁸ *Hyam v. Edwards*, 1 Dall. 2.

⁹ *American Life Ins. & Trust Co. v. Rosenagle*, 77 Penn. St. 507.

clerk for record, the proper mode of proving such fact is by an exemplification of the certificate.¹ But an exemplification of a foreign certificate of marriage will not be received unless it be proved that the record was kept in conformity with law, and that the person officiating was authorized to officiate.²

§ 660. We have already observed that for the purpose of proving pedigree, and other matters of family interest, family bibles and other records may be received.³ For the same purpose a family chart, regarded as authoritative by the family, may be put in evidence.⁴

Family records admissible to prove family events.

VI. CORPORATION BOOKS.

§ 661. Where a corporation keeps books, in which its proceedings are entered, then these books are primary, but usually only *prima facie* evidence of such proceedings, so far as concerns the members of the corporation, as between each other, or as against the corporation.⁵ So a banker's books may be used against a depositor, when such books are supported by the oath of the book-keeper.⁶ But with-

Books of a corporation admissible against members.

¹ Niles v. Sprague, 13 Iowa, 198.

² State v. Dooris, 40 Conn. 145.

³ Supra, § 219.

⁴ North Brookfield v. Warren, 16 Gray, 171.

⁵ R. v. Mothersell, 1 Str. 93; Marriage v. Lawrence, 2 B. & Ald. 144; Owings v. Speed, 5 Wheat. 420; Warner v. Daniels, 1 Wood. & M. 90; Coffin v. Collins, 17 Me. 440; Methodist Chapel v. Herriek, 25 Me. 354; Slack v. Norwich, 32 Vt. 818; Brown v. Bank, 119 Mass. 69; Goodwin v. Ann. Co. 24 Conn. 591; Lane v. Brainerd, 30 Conn. 565; Highland Turnpike v. McKean, 10 Johns. R. 154; Partridge v. Badger, 25 Barb. 146; Van Hook v. Man. Co. 1 Halst. Eq. 137; Devling v. Williamson, 9 Watts, 311; Denison v. Otis, 2 Rawle, 9; Pittsburg v. Clarke, 29 Penn. St. 146; Bavington v. R. R. 34 Penn. St. 358; North

Am. Co. v. Sutton, 35 Penn. St. 463; McHose v. Wheeler, 45 Penn. St. 32; Grove v. Fresh, 9 Gill & J. 280; Fitch v. Pinecard, 5 Ill. 69; Fortin v. Engine, 48 Ill. 451; Merchants' Bk. v. Rawls, 21 Ga. 334; Duke v. Nav. Co. 10 Ala. 82; Rayburn v. Elrod, 43 Ala. 700. See State v. Thomas, 64 N. C. 74.

⁶ Jordan v. Osgood, 109 Mass. 457. "One of the issues involved was the insolvency of the defendant before and at the time of his purchases. It was competent to show what money he had in the bank at those times. For this purpose the books of the bank, supported by the oath of the book-keeper, were admissible. Briggs v. Rafferty, 14 Gray, 525; Adams v. Coulliard, 102 Mass. 167." Morton, J., Jordan v. Osgood, 109 Mass. 464.

out such verification the books of account of a bank are not evidence of the facts indicated by the entries.¹

§ 662. Corporation books, however, when *res inter alios acta*, cannot at common law be used to sustain a claim of the corporation against persons not members of the corporation, or defeat a claim of such persons against the corporation, or in any way to affect strangers.² Nor can they, when the officers of the corporation can be produced to verify the facts, be used in suits by strangers against members of the corporation, or the converse.³ Nor can they, even in suits by a corporation against its members, be used as proving, in behalf of the corporation, self-serving entries;⁴ nor can they be used to prove, against the corporation, mere private agreements of the stockholders.⁵ But the minute book of a corporation may be put in evidence, as against strangers, to prove its regular organization;⁶ or other evidential (as distinguished from dispositive) facts.⁷ And as admissions by members, to whose inspection such books are open, entries in corporation or club books are always admissible.⁸ The mode of proving such books is elsewhere noticed.⁹

¹ *White v. Ambler*, 4 Seld. 170; *Brewster v. Doane*, 2 Hill, 537; *Ocean Nat. Bank of N. Y. v. Carll*, 55 N. Y. 441.

"As the officers of the bank could not speak from personal knowledge, it was necessary to resort to the entries made by the discount clerk. These could only be proved by the clerk making them, as it appeared he was alive and within the state. This rule of authenticating records of this character has never been departed from in this state. 4 Seld. 170; 2 Hill, 531, 537." *Church, Ch. J., Ocean Nat. Bank of N. Y. v. Carll*, 55 N. Y. 441.

² *London v. Lynn*, 1 H. Bl. 214; *Wheeler v. Walker*, 45 N. H. 355; *Highland Turnpike Co. v. McKean*, 10 Johns. 154; *New England Co. v. Vandyke*, 1 Stockt. (N. J.) 498; *Com. v. Woelper*, 3 S. & R. 29; *Graff v. R. R.*

31 Penn. St. 489; *Chase v. R. R.* 38 Ill. 215; *Ritchie v. Kinney*, 46 Mo. 298; *Union Bk. v. Call*, 5 Fla. 409. In England, by statute, such books have in several cases been made admissible. *Taylor's Ev.* § 1581.

³ *Mudgett v. Horrell*, 33 Cal. 25.

⁴ *Haynes v. Brown*, 36 N. H. 545. See *Marriage v. Lawrence*, 3 B. & A. 144.

⁵ *Black v. Shreve*, 13 N. J. Eq. 455. See *Marriage v. Lawrence*, 3 B. & A. 144.

⁶ *Angell & Ames on Corp.* 573; *Grant v. Coal Co.* 1 Weekly Notes of Cases, 215. See *Dennison v. Otis*, 2 Rawle, 9; *Devling v. Williamson*, 9 Watts, 311.

⁷ *Breton v. Cope*, Pea. R. 30; *Marsh v. Colnett*, 2 Esp. 665; *Woonsocket v. Sherman*, 8 R. I. 564.

⁸ *Infra*, § 1131.

⁹ *Ibid.*

§ 663. In matters incidental to the action of a corporation, as to which it is not to be presumed a record would necessarily be made, parol evidence of the action of the corporation is admissible;¹ and so when it is proved that a record, though proper, was never made;² and when a corporation refuses to produce its books, these may be proved by parol.³ When a corporation acknowledges an agent as such, it is not necessary to prove his appointment.⁴ It is otherwise when it is sought to charge the corporation with the insulated act of a special agent.⁵

When proceedings of corporation can be proved by parol.

VII. BOOKS OF HISTORY AND SCIENCE; MAPS.

§ 664. A book published by a private person involving statements of recent facts cannot, unless as against the author, be received as evidence of the facts which it states. To prove such facts the author must be called as a witness whenever he is within the process of the court.⁶ Nor can such book be received when secondary; thus Dugdale's *Monasticon Anglicanum* has been rejected as evidence to show that the Abbey de Sentibus was an inferior abbey, because the original records were producible.⁷ But where the author is out of the reach of such process, then a book of his

Approved books of history and geography by deceased authors receivable.

¹ Bank U. S. v. Dandridge, 12 Wheat. 64; Davidson v. Bridgeport, 8 Conn. 472; Commercial Bank v. Kortright, 22 Wend. 348; Partridge v. Badger, 25 Barbour, 146; Smiley v. Mayor, 6 Heiskell, 604. Supra, § 77.

² Prothro v. Seminary, 2 La. An. 939.

³ Supra, § 153; Thayer v. Ins. Co. 10 Pick. 326.

⁴ Wharton on Agency, §§ 40, 59; Maine Stage Co. v. Longley, 14 Me. 444. See supra, § 77; infra, § 1315.

⁵ Haven v. Asylum, 13 N. Hamp. 532.

⁶ Morris v. Harmer, 7 Pet. 554; U. S. v. Jackalow, 1 Black U. S. 484; Fuller v. Princeton, 2 Dane Ab. ch. 48, 49; Morris v. Edwards, 1 Ohio,

524; Houghton v. Gilbert, 7 C. & P. 701.

"A book published in this country, by a private person, is not competent evidence of facts stated therein, of recent occurrence, and which might be proved by living witnesses, or other better evidence; and the book in question, not being shown to have been approved by any public authority, or to be in general use among merchants or underwriters, had no tendency to show that the island of Navassa was commonly called and known as a guano island." Gray, J., Whiton v. Ins. Co. 109 Mass. 31.

As to how far a court will take judicial notice of past history, see supra, § 338.

⁷ Salk. 281.

tory, travels, or chronicles is admissible for what it is worth, so far as concerns facts out of the memory of living men.¹ And as a general rule, any approved public and general history (and of the fact of approval the court will take judicial notice²) is admissible to prove ancient facts of a public nature either at home or abroad.³ It is otherwise, however, as to matters of a private nature; such as the descent of families, or even the boundaries of

¹ *Brounker v. Atkyns*, Skin. 14; *Neale v. Fry*, 1 Salk. 281; 1 Mod. 86; *Picton's case*, 30 How. St. Tr. 492; *Morris v. Harmer*, 7 Peters U. S. 554; *Missouri v. Kentucky*, 11 Wall. 395; *Bogardus v. Trin. Church*, 4 Sandf. Ch. 633; *Com. v. Alburger*, 1 Whart. R. 469; *State v. Wagner*, 61 Me. 181; *Charlotte v. Chouteau*, 33 Mo. 194. See *Woods v. Banks*, 14 N. H. 101; *McKinnon v. Bliss*, 21 N. Y. 206.

² *Supra*, § 282.

³ B. N. P. 248-9; *Case of Warren Hastings*, referred to by *Ld. Ellenborough* in *Picton's case*, 30 How. St. Tr. 492; 2 Ph. Ev. 123; *Ld. Bridge-water's case*, cited Skin. 15; *Brounker v. Atkyns*, Skin. 14; *St. Catherine's Hospital case*, 1 Vent. 151; *Neale v. Fry*, cited 1 Salk. 281; *S. C. nom. Neal v. Jay*, cited 12 Mod. 86; *S. C. nom. Lady Ivy and Neal's case*, cited Skin. 623. The authority, however, of the three last cited reports is weakened by the fact that, in *Mossom v. Ivy*, 10 How. St. Tr. 555, apparently the same case, while no chronicles appear to have been offered in evidence, a history was tendered to show when *Charles the Fifth* resigned; *Jeffries, C. J.*, however, rejected the history contemptuously, blurting out that it was "a little lousy history," and then asking, "Is a printed history, written by *I know not who*, an evidence in a court of law?" P. 625. See *Pea. Ev.* 82, 83.

In a Maine case we have the following:—

"General histories of painstaking authors, long since deceased, and of established reputation, like those of *Williamson* and *Belknap*, are competent evidence upon a question of this nature. No one claims them as conclusive or infallible; but carefully used as aids and guides, and accepted as true where their statements are uniform and consistent with the evidence of original records, and admitted or well known facts, they will be found of great service in arriving at a satisfactory conclusion.

"The case of *Evans v. Getting*, 6 Car. & P. 586, which was cited at the trial against their admission, and which seems, also, to be the basis of the remark in *Greenleaf's Evidence*, vol. i. § 497, to the effect that, in regard to the boundaries of a county, they are not admissible, would be found, on examination, by implication, to favor the admissibility of general histories of states, like those of *Williamson* and *Belknap*. In that case it was a history of *Brecknockshire* that was offered to prove the boundary between that county and *Glamorgan*; and *Alderson, B.*, rejected it with the remark: 'The writer of this history, probably, had the same interest in enlarging the boundaries of the county as any other inhabitant of it. It is not like a general history of *Wales*.'" *Barrows, J.*, *State v. Wagner*, 61 Me. 188.

counties.¹ College catalogues,² and peerage lists, and army and navy lists,³ are likewise inadmissible, if offered as to matters which could be proved by living witnesses. So the fact of Sir William Johnson's ownership of the "Royal Grant," is a private rather than a public incident, and cannot be proved by a volume of history, it being open to proof by better testimony.⁴ So the Gazetteer of the United States, without further authentication, cannot be received to prove the relative distances of geographical points.⁵

But to illustrate the meaning of words and allusions, books of general literary history may be referred to.⁶ Thus in a case before the English court of exchequer,⁷ it was ruled that works of standard authority in literature may, provided the privilege be not abused, be referred to by counsel or a party at a trial, in order to show the course of literary composition, and explain the sense in which words are used, and matters of a like nature; but that they cannot be resorted to for the purpose of proving facts relevant to the cause. And Sir Edward Coke lays down, "*Authoritates philosophorum, medicorum et poetarum sunt in causis allegandae et tenendae.*"⁸

§ 665. For several reasons, treatises on such of the inductive sciences as are based on data which each successive year corrects and expands, must be refused admission when offered to prove the truth of facts contained in such treatises. In the first place, a sound induction last year is not necessarily a sound induction this year; and as a matter of fact, works of this class, when they do not become obsolete, are altered in material features from edition to edition, so that we cannot tell, in citing from even a living author, whether what we read is not something that this very author now rejects.⁹ In

Books of inductive science not usually admissible.

¹ Steyner v. Droitwich, Skin. 623;

⁶ Supra, § 282.

¹ Salk. 281; 12 Mod. 85; Evans v. Getting, 6 C. & P. 586.

⁷ Darby v. Ouseley, 1 H. & N. 1.

² State v. Daniels, 44 N. H. 383.

⁸ Co. Lit. 264 a; Best's Evidence, 802.

³ Marchmont Peer. Min. Ev. 62, 77; Wetmore v. U. S. 10 Pet. 647.

⁹ "The great representative, in late years, of British geology, is the late Sir Charles Lyell. But a few months before his death he published the new edition of his Principles of Geology. While he lived he bestowed upon the correction of his works un-

⁴ McKinnon v. Bliss, 21 N. Y. 206.

⁵ Spalding v. Hedges, 2 Penn. St. 240. In the Tichborne trial, maps of Australia were received to show where the defendant lived. Steph. Ev. art. 37.

the second place, if such books are admitted as a class, those which are compilations must be admitted as well as those which contain the results of original research; the purely speculative must come in side by side with the empirical; so that if such treatises are admitted at all, it will be impossible to exclude those which are secondary evidence of the facts they state. In the third place, such books, without expert testimony, cannot generally be pointed to the concrete case; with expert testimony, they become simply part of such testimony, and lose their independent substantive character as books. In the fourth place, the authors of such books do not write under oath, and hence write often tentatively; nor are they examined under oath, and hence the authorities on which they rest cannot be explored, nor their processes of reasoning tested. Lastly, such works are at the best hearsay proof of that which living witnesses could be produced to prove. Books of this class, therefore, though admissible, if properly authenticated, to prove the state of science at a particular epoch, are inadmissible as independent substantive evidence, to prove the facts they set forth.¹ In an argument to a

wearied labor. Edition after edition was called for, and in each whole passages — sometimes whole chapters — were remodelled. A quotation from one of the earlier editions may not improbably be searched for in vain in those which subsequently left his hands; and there are not wanting instances in which an opinion, contested by competent adversaries, was quietly dropped without any formal parade. His judgment was always open to appeal, and his clear and manly intellect acknowledged no finality in matters of opinion; therefore, on matters which we know to have been brought before him, with their accompanying evidence, we may consider ourselves as possessing his final verdict. It would not be fair, when quoting, as we must do, comments unfavorable to some of the conclusions at which Sir Charles Lyell arrived, to refrain from acknowledging the care with which his opin-

ions were formed, and the candor with which they were surrendered if ever his better judgment considered them untenable." London Quarterly Rev. July, 1876, Amer. ed. p. 115. See, also, the changes of stand-point of Prof. Huxley, as given in Contemporary Review, 1876, p. 122.

¹ Collier v. Simpson, 5 C. & P. 73; Terry v. Ashton, 34 L. T. 97; Ashworth v. Kittridge, 12 Cush. 193; Washburn v. Cuddihy, 8 Gray, 430; Whiton v. Ins. Co. 109 Mass. 24; State v. O'Brien, 7 R. I. 336; Harris v. R. R. 3 Bosw. (N. Y.) 7; Spalding v. Hedges, 2 Penn. St. 240; Yoe v. People, 49 Ill. 410; Carter v. State, 2 Ind. 617; Gehrke v. State, 13 Texas, 568; Fowler v. Lewis, 25 Texas, Supp. 381. As indicating a contrary practice, see Ordway v. Haynes, 50 N. H. 159; Bowman v. Woods, 1 Greene (Iowa), 441; Bowman v. Torr, 3 Iowa, 571;

court, such works can indubitably be read, not as establishing facts (unless such books are regarded as matters of notoriety, as are ordinary dictionaries), but as exhibiting distinct processes of reasoning which the court, from its own knowledge as thus refreshed, is able to pursue.¹ But if read to establish facts, capable of proof by witnesses, such books cannot be received. "Thus it is not competent, in an action for not farming according to covenant, to refer to books for the purpose of showing what is the best way of farming. Nor in an action on the warranty of a horse, would it be allowable to refer to works of a veterinary surgeon to show what is unsoundness."² So in an action for a libel, charging the plaintiff with being a rebel and traitor, "because he was a Roman Catholic," the defendant was not allowed to justify by citing books of authority among the Roman Catholics, which seemed to show that their doctrines were inimical to loyalty.³

§ 666. It has indeed been held, that an expert, when called to state the sense of his profession on a particular topic, may cite authorities as agreeing with him, and may refresh his memory by referring to standard works in his specialty.⁴ But such witnesses are not permitted, in their testimony, to read extracts from books on physical philosophy as primary proof.⁵ It is clear, however, that when an expert cites certain works as authority, they may be put in evidence to contradict him.⁶

§ 667. The reasons just stated, however, fail in their force when we approach books of exact science, in which conclusions, from certain and constant data are reached by processes too intricate to be elucidated by a witness

Otherwise
as to books
of exact
science.

Broadhead v. Wiltse, 35 Iowa, 429 (by statute); *Cory v. Silcox*, 6 Ind. 39; *Luning v. State*, 1 Chand. (Wisc.) 264; *Ripon v. Bittel*, 30 Wisc. 614; *Stoudenmeier v. Williamson*, 29 Ala. 558; *Merkle v. State*, 37 Ala. 139.

¹ See fully supra, §§ 282, 335; *Harvey v. State*, 40 Ind. 516.

² Per Pollock, C. B., *Darby v. Ousely*, 1 H. & N. 12.

³ *Darby v. Ousely*, 1 H. & N. 1; *Powell's Evidence*, 4th ed. 105.

⁴ Supra, § 438; *Cocks v. Purday*, 2 C. & K. 270; *Collier v. Simpson*, 5 C.

& P. 74; *McNaghten's case*, 10 Cl. & Fin. 200; *Pierson v. Hoag*, 47 Barb. 243; *Cory v. Silcox*, 6 Ind. 39; *Harvey v. State*, 40 Ind. 516; *Bowman v. Torr*, 3 Iowa, 571; *Ripon v. Bittel*, 30 Wisc. 614; *State v. Terrell*, 12 Rich. (S. C.) 321; *Merkle v. State*, 37 Ala. 139.

⁵ *Com. v. Wilson*, 1 Gray, 337; *Washburn v. Cuddihy*, 8 Gray, 430; *Com. v. Sturtivant*, 117 Mass. 122. See fully supra, § 438.

⁶ *Ripon v. Bittel*, 30 Wisc. 614.

when on examination on a stand. The books containing such processes, if duly sworn to by the persons by whom they are made, are the best evidence that can be produced in that particular line.¹ When the authors of such books cannot be reached, the next best authentication of the books is to show that they have been accepted as authoritative by those dealing in business with the particular subject. Hence the Carlisle and Northampton Tables have been admitted by the courts as showing what is the probable duration of life under particular conditions.² In order to verify the book it is proper to prove, by a witness qualified to speak to the point, that it is in use in the particular line of business to which the book relates.³ It

¹ See *supra*, § 134.

² *Mills v. Catlin*, 22 Vt. 106; *Schell v. Plumb*, 55 N. Y. 598; *Bank v. Hoggendobler*, 3 Penn. L. J. 37; *S. C.* 4 Penn. L. J. 392; *Balt. R. R. v. State*, 33 Md. 542; *Williams's case*, 3 Bland Ch. 221; *Donaldson v. R. R.* 18 Iowa, 280; *David v. R. R.* 41 Ga. 223.

“An exception was taken by the counsel to the reception of the Northampton Tables as evidence tending to show the probable duration of the life of the plaintiff. It may be remarked that the objection thereto was general, not based upon the want of preliminary proof, showing their genuineness or want of identity with those long in use by insurance companies and courts for this purpose. These tables were used by the supreme court in *Wager v. Schuyler*, 1 Wend. 553, for this very purpose, in an action of covenant where the probable duration of life was determined by the court in this way, upon a verdict subject to the opinion of the court. That they have been long so used by the court of chancery in this state, and courts of equity in England, is too well known to require any citation of cases. They have been adopted by a rule of the supreme court for this purpose. Rule 85. It would be singular, indeed, if,

under these facts, they were to be held inadmissible, when the same fact was to be determined by a jury. They were competent in connection with the proof given as to the health, constitution, and habits of the plaintiff. No complaint is made of the charge in this respect.” *Grover, J., Schell v. Plumb*, 55 N. Y. 598.

³ *Rowley v. R. R.* L. R. 8 Exch. 226. In this case it was said by *Blackburn, J.* :—

“Now, with the view of ascertaining the probable duration of a particular life at a given age, it is material to know what is the average duration of the life of a person of that age. The particular life on which an annuity is secured may be unusually healthy, in which case the value of the annuity would be greater than the average; or it may be unusually bad, in which case the value would be less than the average; but it must be material to know what, according to experience of insurance companies, the value of an annuity secured on an average life of that age would be. In the present case, with a view of enabling the jury to estimate the value of the annuity, a witness was called who stated that he was an accountant, acquainted with the business of insur-

should at the same time be remembered that while the Carlisle and other tables may be received to prove certain results of a large induction, they cannot be permitted to control a litigation, as to the value of a life estate, so as to work substantial injustice.¹

ance companies, and who referred to the Carlisle Tables, to which, he said, life insurance companies referred for obtaining information as to the average duration of lives. He gave evidence that, according to those tables, the average and probable duration of a life of forty years is 27.6, and that of a life of sixty-one is 13.82 years; and that the sum which would purchase an annuity of £200 on the life of a person of sixty-one years is £2,000. It is observable that as the mother's annuity was for the joint lives of herself and son, not for her own life, this last question was not relevant, but that seemed to have escaped notice.

"The first exception is as to the reception of this evidence. We think the probable and average duration of a life of that age was material, and we do not see how that could be better shown than by proving the practice of life insurance companies, who learn it by experience. It was objected that the witness was not an actuary, but only an accountant, but as he gave evidence that he was experienced in the business of life insurance, we think his evidence was admissible, though subject to remarks on its weight. We therefore think that the first exception cannot be maintained."

See, also, *Ordway v. Haynes*, 50 N. H. 159, where it was said that engravings of scientific results might be used to illustrate an argument.

¹ In *Shippen's Appeal* (Platt's Est.), 2 Weekly Notes of Cas. 468, where the evidence was that a husband and wife executed a mortgage of the wife's land for \$12,000, of which amount the

husband appropriated \$4,221 to his own use, and subsequently made an assignment for the benefit of his creditors; and after the death of the wife, the land was sold by the sheriff under the mortgage, after payment of which there remained for distribution \$12,000, which was claimed by a devisee of the wife, and also by the husband's assignees; it was ruled by the supreme court of Pennsylvania, that the value of the husband's life interest as tenant by the curtesy was to be computed at one third the fee, and not according to the Carlisle Tables.

"As to the measure of the life estate of Clayton T. Platt" (the life tenant), said the court, "we say that the Carlisle Tables are not authoritative. They answer well their proper purpose, to ascertain the average duration of life, so as to protect life insurers against ultimate loss upon a large number of policies, and thereby to make a profit to the shareholders. But an individual case depends on its own circumstances, and the relative rights of the life tenant and remainder-man are to be ascertained accordingly."

"A consumptive or diseased man does not stand on the same plane as one of the same age in vigorous health. Their expectations of life differ in point of fact. A court, therefore, must ascertain the actual probable expectations of life of the party as he is, or must adopt some recognized approximate standard as its legal measure, in order to capitalize the interest he is entitled to for life. In this case, the Carlisle Tables, it is said, would give the value of the

§ 668. No matter what may be the age or apparent accuracy of a map, it is not receivable in evidence of reputation, unless it be traceable to or shown to have been recognized by persons who were in some way interested in or likely to have had knowledge of the locality which the map describes.¹ Where, however, a map was shown to have been made thirty years before the trial by a surveyor, upon information derived from an old parishioner, who had pointed out to the surveyor the boundaries, it has been held in England that the map becomes admissible on proof of the surveyor's death.² A map made by an official surveyor is evidence if fortified by his oath, if his evidence be procurable, or if not, by proof of his official station and of his handwriting.³ A long acceptance and practical adoption by the public, also, may be a ground for the admission of a map which is ancient, and taken from the proper depository.⁴ Thus an ancient map or survey reputed to be such, and regarded as authority in respect to the land described, and recorded as a public document in the proper office or archives, can be received as *primâ facie* proof of public boundaries and streets.⁵ So the map of the village of St. Louis, made by Auguste Chouteau, a reputed founder of the village, in 1764, which was about the time the village was founded, and placed by him in the United States office for the record of land titles, having been generally regarded as a public paper

life estate or capitalized interest at \$6,534.60, leaving the fee simple estate worth but \$5,202. The disproportion is quite manifest. We are, therefore, disposed to take the old common law rule of one third of the whole sum as the present value of the accumulated interest for the life of Clayton T. Platt. This gives a sum of several hundred dollars less than that received by him out of his wife's mortgage money."

¹ See *supra*, § 194; *Hammond v. Bradstreet*, 10 Ex. R. 390. See *Pipe v. Fulcher*, 1 E. & E. 111; *Johnston v. Jones*, 1 Black (U. S.), 209; *Jackson v. Frost*, 5 Cow. 346; *Jackson v. Vandyke*, 1 Coxe (N. J.), 28; *Denn v.*

Pond, 1 Coxe (N. J.), 379; *Pfotzer v. Mullaney*, 30 Iowa, 197; *Avary v. Searey*, 50 Ala. 54.

² *R. v. Milton*, 1 C. & K. 58. See, however, *Pollard v. Scott*, Pea. R. 19. And see *Dunn v. Hayes*, 21 Me. 76; *Stein v. Ashby*, 24 Ala. 521; and *supra*, §§ 194-199.

³ *Supra*, § 238; *Smith v. Strong*, 14 Pick. 128; *Com. v. Alburger*, 1 Whart. R. 469; *Chisholm v. Perry*, 4 Md. Ch. 31; *Cline v. Catron*, 22 Grat. 378; *Surget v. Doe*, 24 Miss. 118; *Gates v. Kieff*, 7 Cal. 124; *Doherty v. Thayer*, 31 Cal. 140.

⁴ *Supra*, §§ 194-7.

⁵ *Whithehouse v. Bickford*, 29 N. H. 471.

for many years, and kept as such in the record office, may be received as *prima facie* evidence of the plan of the village.¹ But for the purpose of proving the location of streets, a map, made even by a city surveyor and registered in the proper office, will not be received, if such map was made without authority, express or implied, and has not the authority of age and acceptance.² *A fortiori*, such maps unacted on and unrecorded cannot be received when made by a stranger.³

§ 669. These conditions, however, may be relaxed as to an indisputably ancient map obtained from its natural custodians.⁴ Thus on these grounds a document purporting to be a survey of

¹ *St. Louis v. Erskine*, 31 Mo. 110; *Schools v. Risley*, 10 Wall. 91.

² *Harris v. Com.* 20 Grat. 833.

³ *Marble v. McMin*n, 57 Barb. 610.

In a case in the exchequer chamber (*Hammond v. Bradstreet*, 10 Ex. 390), on a question in replevin whether goods were taken in Norfolk or Suffolk, a map of Suffolk, purporting to have been republished in 1766, *with corrections and additions*, by the sons of J. K., from a map published in 1736 by J. K., who then took an accurate survey of the whole country, was tendered, to show that the *locus in quo* was not in Suffolk. It was produced by a magistrate of both Norfolk and Suffolk, who had purchased it twelve or fourteen years previously, and before any dispute as to the boundaries had arisen. The court rejected the evidence, chiefly on the ground that the new editors did not appear to have had any personal knowledge of the subject, nor to be in any way connected with the district, so as to make it probable that they had such knowledge. We must consequently hold, in accordance with the distinction heretofore stated (*supra*, §§ 194-7), that, before ancient documents can be received as evidence of reputation, it must be proved that they have come from the custody of a person who is

presumptively connected sufficiently by knowledge with the matter in dispute, so as to render him an authority. They must also bear the plain marks of authenticity. *Powell's Evidence*, 4th ed. 157.

But the map must go to the specific point in issue. Thus, to prove a public right of way over a manor, a map of the manor, which had been made by a deceased steward of the manor, was given in evidence. The map showed lines made by the deceased witness, which indicated clearly some kind of way over the *locus in quo*, but contained nothing to show whether the way was a public one, or only one of several occupation ways such as existed on the manor. If the way had been an occupation way, it would have been of a private nature, and it was admitted could not be proved by the evidence which had been given; and as there was nothing on the face of the map to show that it was a public way, and the map had been used only to settle the boundaries of the copyholds of the manor, it was held to be inadmissible. *Pipe v. Fulcher*, 1 E. & E. 111.

⁴ See *supra*, §§ 190-7; *Adams v. Stanyan*, 24 N. H. 405; *Com. v. Alburger*, 1 Whart. R. 469; *Penny Pot Landing v. Philadelphia*, 16 Penn. St. 79.

a manor, while it was part of the possessions of the duchy of Cornwall, and coming out of proper custody, was admitted by Lord Romilly, in a late case,¹ as evidence of the boundaries and customs of the manor.² But the testimony of a recorder's clerk, that a town plan, offered as a link in a chain of title, had been in deposit in the office for more than six years, but no longer, is not, without further verification, proof of authenticity.³ And such maps will not be received to impeach public recorded grants under which there has been long possession.⁴

What has been just said, it should be remembered, applies to questions of boundaries and public landmarks.⁵ When a map is introduced as a link of title, it must be proved in the way that any other documentary link is proved.⁶

§ 670. A map of boundaries, also, is admissible against the party by whom it is made and published, and against his successors in title.⁷ Such maps, however, must be properly identified.⁸

Maps admissible against parties and privies.

¹ *Smith v. Earl Brownlow*, L. R. 9 Eq. 241; 39 L. J. Ch. 636; 18 W. R. 271.

² *Powell's Evidence* (4th ed.), 158.

³ *Franey v. Miller*, 11 Penn. St. 434. See *Pipe v. Fulcher*, 1 E. & E. 111.

⁴ *Penny Pot Landing v. Phila.* 16 Penn. St. 79.

⁵ See fully *supra*, §§ 185-191.

⁶ "Pedigree and boundary are the excepted cases wherein reputation and hearsay of deceased persons are received as evidence. The statements of deceased persons relative to boundaries of which they spoke from actual personal knowledge, have been frequently received as evidence in this state. *Caufman v. Cedar Spring Congregation*, 6 Binn. 62, 63; *Buchanan v. Moore*, 10 S. & R. 281; *Bender v. Pitzer*, 3 Casey, 335. And ancient maps and surveys are evidence to elucidate and ascertain boundary and fix monuments. *Penny Pot Landing, &c.*

v. City of Philadelphia, 4 Harris, 91; *Sample v. Robb*, *Ibid.* 319. The distinction is stated by Coulter, J., in the last case, to be between drafts when offered for title and when offered for boundary. For the former purpose none but such as are shown to bear an official character will be received. These must be traced to the possession or office of the surveyor, and appear to have been made in an official character. *Urket v. Coryell*, 5 W. & S. 79; *Woods v. Ege*, 2 Watts, 336-7; *Blackburn v. Holliday*, 12 S. & R. 140. The question here being one of the possession, and the extent of it, by the boundary known as Taylor's line, the draft being properly proved and traced, was competent evidence to aid in ascertaining and identifying that boundary." *Agnew, J., McCausland v. Fleming*, 63 Penn. St. 38.

⁷ *Bridgman v. Jennings*, 1 Ld. Ray.

⁸ See *supra*, § 644; *Sherras v. Caig*, 7 Cranch, 34; *Chirac v. Reinecker*, 2

Pet. U. S. 619. See *Carroll v. Smith*, 4 Har. & J. 128. *Infra*, § 1156.

VIII. GAZETTES AND NEWSPAPERS.

§ 671. In England, by the Documentary Evidence Act, the government or official gazette is "*prima facie* evidence of any proclamation, order, or regulation," of the government or of any of its departments. At common law, a distinction is taken in this connection between grants or commissions to an individual, and the correspondence of the crown with the public as a body. The gazette is not at common law evidence of the grant of land to a subject,¹ nor of the commissioning of an officer of the army;² but it is admissible to prove proclamations, and addresses received by the crown, and other matters of exclusively public importance, and as to which there is no private record kept.³ The same distinction has been recognized in the United States.⁴

Gazette evidence of public official documents.

§ 672. It is frequently important that a party should be shown, either directly or inferentially, to be familiar with certain facts. Did the claimant in the Tichborne case, for instance, when in Australia, know of the advertisements calling for information as to Roger Tichborne, and of the circumstantial account of the Tichborne family published about that time in the London Illustrated News? In order to afford a basis from which knowledge of facts so published can be inferred, it is necessary, first, to prove the publication in the newspaper; and secondly, incidents which make it probable that the publication was seen by the person whom it is sought to infect with notice. In the Tichborne trial, Cockburn, C. J., examines with great acuteness the probabilities of notice under such circumstances, as helping out the hypothesis that the claimant, an adroit impostor, was in this way stimulated and in some way prepared to undertake the work of simulation. If there is any evidence making it probable that a newspaper

Newspapers admissible to impute knowledge of facts to party.

734; *Earl v. Lewis*, 1 Esp. 1; *Wake-man v. West*, 7 C. & P. 479; *Doe v. Lakin*, 7 C. & P. 481; *Johnston v. Jones*, 1 Black U. S. 209; *Crawford v. Loper*, 25 Barb. 449; *Kingsland v. Chittenden*, 6 Lans. 15; *Burnett v. Thompson*, 13 Ired. L. 379; *Chic. R. v. Banker*, 44 Ill. 26. See, however, *Bearee v. Jackson*, 4 Mass. 408.

¹ *R. v. Holt*, 5 T. R. 443.

² *R. v. Gardner*, 2 Camp. 513.

³ *Atty. Gen. v. Theakstone*, 8 Price, 89; *Van Omeron v. Dowick*, 2 Camp. 44. See *supra*, § 127.

⁴ *Brundred v. Del Hoyo*, 20 N. J. L. 328; *Lurton v. Gilliam*, 1 Seam. 577.

reached the eye of a particular person, it would seem that the question of notice is one for the jury.

§ 673. It is held that so far as concerns those who have never dealt with a firm, notice of its dissolution in the *Gazette* (or, it would seem, in any other public newspaper in which such notices are usually printed), will be admissible;¹ and that even as to persons having had old and familiar dealings with the firm, the newspaper may be received as cumulative evidence of notoriety of dissolution, after first proving the fact of dissolution by deed or otherwise.² By the same process may be inferred knowledge of the arrival of a stage-coach at a particular hour.³ But in order, in the latter class of cases, to enable the newspaper to be received as adequate proof of notice, it is necessary that it should in some way be brought home to the party. How this may be done will be presently seen.

§ 674. A newspaper, whose office it is to procure and publish market prices, and whose editors are proved to apply to brokers and others dealing with the staple for information, is *primâ facie* evidence of such prices, at a time when living witnesses to the fact cannot be obtained. Such evidence is the best procurable, and may be regarded in the same light as are registries kept by persons in discharge of their business duties.⁴ But such publications are not admissible without evidence showing that the prices current are drawn from reliable sources.⁵

¹ *Newsome v. Coles*, 2 Camp. 617; *Hart v. Alexander*, 7 C. & P. 753. See *infra*, § 675.

² *Hart v. Alexander*, 7 C. & P. 753.

³ *Com. v. Robinson*, 1 Gray, 555.

⁴ *Cliquot's Champagne*, 3 Wallace, 117.

⁵ *Whelan v. Lynch*, 60 N. Y. 469. See *Whitney v. Thacher*, 117 Mass. 523 (cited at large, *supra*, § 449); *Sisson v. Cleveland R. R.* 14 Mich. 489; *Payson v. Everett*, 12 Minn. 216.

From *Whelan v. Lynch*, 60 N. Y. 474, we extract the following:—

“Independent of the charge, the

court was also in error, I think, in admitting the shipping and price current list as evidence of the value of the wool, without some proof showing how or in what manner it was made up, where the information it contained was obtained, or whether the quotations of prices made were derived from actual sales or otherwise. It is not plain how a newspaper, containing the price current of merchandise, of itself, and aside from any explanation as to the authority from which it was obtained, can be made legitimate evidence of the facts stated. The accuracy and correctness of such publications depend entirely upon the

§ 674 a. Where advertisements in a newspaper can be traced

sources from which the information is derived. Mere quotations from other newspapers, or information obtained from those who have not the means of procuring it, would be entitled to but little if any weight. The credit to be given to such testimony must be governed by extrinsic evidence, and cannot be determined by the newspaper itself without some proof of knowledge of the mode in which the list was made out. As there was no such testimony the evidence was entirely incompetent, and should not have been received. The authorities cited to sustain the ruling of the judge in regard to the admission of this evidence, do not include any such case.

"In *Lush v. Druse*, 4 Wend. 314, the witness who testified as to the market price had inquired of merchants dealing in the article, and examined their books, thus giving the source of his knowledge. In *Terry v. McNiel*, 58 Barb. 241, it does not appear in what form the question was presented, or whether any preliminary evidence had been introduced to show the accuracy of the newspaper quotations. In *Cliquot's Champagne*, 3 Wallace, 117, it appeared that the price current was procured directly from dealers in the article, and was verified by testimony which tended to show its accuracy. The objections made to the evidence were sufficient, and its admissibility cannot be upheld within these cases cited." *Miller, J., Whelan v. Lynch*, 60 N. Y. 474.

In reference to this case we find, in the *Albany Law Journal* for 1876, p. 317, a communication in which it is stated that the recital, in the above opinion, of the facts in *Terry v. McNiel*, 58 Barb. 241, is incomplete, and that in the latter case there was no preliminary evidence showing the accu-

racy of the newspaper quotations. It is also stated that the latter case was "unanimously affirmed on the opinion of Judge Platt Potter, as found in 58 Barb. 241. It will be perceived, therefore, that if the court of appeals are right in their decision in 60 N. Y., they were wrong in their disposition of 58 Barb. 241."

The ruling in *Cliquot's Champagne* is thus explained in a subsequent judgment of the supreme court:—

"The cases of *Fennerstein's Champagne* and *Cliquot's Champagne*, reported in the 3d Wallace, 114, 145, do not infringe upon this rule. Those were cases where it became necessary to establish the market value of certain wines in France, and such value could only be ascertained by sales made by dealers in those wines in different parts of the country, and the prices at which they were offered for sale, and circumstances affecting the demand for them. It would not be proved by a single transaction, for that may have been exceptional; the sale may have been made above the market price, or at a sacrifice below it. Market value is a matter of opinion which may require for its formation the consideration of a great variety of facts. To arrive at a just conclusion prices current, sales, shipments, letters from dealers and manufacturers, may properly receive consideration. A party, without having been previously engaged in any mercantile transaction, may be able to give with great accuracy the market value of an article the dealing in which he has watched; and in stating the grounds of his opinion as a witness, he may very properly refer to all these circumstances, and even the verbal declarations of dealers. *Alfonso v. United States*, 2 Story, 426. Now,

to a particular party, so as to show that he is their author, such advertisements are evidence against him, but not otherwise.¹ When, however, the object is to charge a particular advertisement on a particular person as its author, it is necessary — so has it been ruled in Pennsylvania — to produce the original manuscript. It is only when the latter is non-producible that the printed copy can be received.² So far as concerns ordinary events, it need scarcely be added, a newspaper cannot be produced as evidence.³ Thus the identity or history of a person cannot be proved by a newspaper notice;⁴ although, as we have seen, it is admissible to show such an advertisement, for the purpose of explaining, as in the Tichborne case, the action of another person having notice of such death.

§ 675. It has been held not enough, in order to bring home to

in the cases in 3d Wallace, statements of dealers in the champagne, or of agents of dealers, made in the course of their duties as agents, and letters from dealers, and prices current, were admitted as bearing upon the point sought to be established, the market value of the wines. There is no analogy between these cases and the one at bar. What was the market value of the wines in France was, as already said, a matter of opinion. Whether the defendants had in their possession or custody, between certain dates, 200,000 gallons of distilled spirits, or any other quantity, for the purpose of selling the same with a design to avoid the payment of the duties thereon, was a question of fact and not of opinion.

“If now we apply the rule which we have mentioned to the certificate books of the canal collectors, their inadmissibility is evident. They were not competent evidence as declarations of the collectors, for the collectors had no personal knowledge of the matters stated; they derived all their information either from the bills of lading or verbal statements of the

captains. Nor were the books competent evidence as declarations of the captains, because it does not appear that the bills of lading were prepared by them, or that they had personal knowledge of their correctness, or that their verbal statements, when the bills of lading were not produced, were founded upon personal knowledge; and besides, many of the certificates were admitted without calling the captains who signed them, and without proof of their death or inaccessibility.” *Field, J., Chaffee v. U. S.* 18 Wall. 541.

¹ See *Somervell v. Hunt*, 3 Har. & M. 113; *Freno v. Freno*, 1 Weekly Notes of Cases, 165; *Henkle v. Smith*, 21 Ill. 238; *Stringer v. Davis*, 35 Cal. 25; *Mann v. Russell*, 11 Ill. 586; *Lee v. Flemingsburg*, 7 Dana, 28; *Dennis v. Van Vay*, 28 N. J. L. 158; *Berry v. Mathewes*, 7 Ga. 457.

² *Sweigart v. Lowmarter*, 14 Serg. & R. 200.

³ See *Ring v. Huntington*, 1 Mill (S. C.), 162.

⁴ *Fosgate v. Herkimer Man. Co.* 9 Barb. 287.

a party knowledge of a newspaper notice, to show that the newspaper was circulated in the neighborhood of the party's residence.¹ But it will be enough, to enable the newspaper to go to the jury, to prove that it was taken by the party on whom it is sought to prove notice,² or that he attended habitually a reading room where it was, or was shown in some other way to have been familiar with the paper;³ or that the newspaper is one with which it is his duty to be familiar, as are underwriters with Lloyd's Shipping List.⁴

Knowledge of newspaper notice may be proved inferentially.

IX. PICTURES AND PHOTOGRAPHS; PLANS AND DIAGRAMS.

§ 676. Of persons who are dead, or cannot for other reasons be produced in court, duly authenticated pictures⁵ and photographs⁶ are admissible in questions of pedigree and identity; though they are open to parol explanation. Photographs of places may, in like manner, be

Pictures and photographs are admissible.

¹ *Norwich Nav. Co. v. Theobald*, M. & M. 153; *Kellogg v. French*, 15 Gray, 354. *Supra*, § 673.

² *Godfrey v. Macaulay*, Pea. R. 155, n.; *Jenkins v. Blizard*, 1 Stark. R. 419; *Hart v. Alexander*, 2 M. & W. 484; *Leeson v. Holt*, 1 Stark. R. 186.

³ *Ibid*.

⁴ *Mackintosh v. Marshall*, 11 M. & W. 116.

⁵ *Camoys Peerage case*, 6 Cl. & F. 801.

⁶ *Whart. & St. Med. Jur.* ii. § 123; *Ruloff v. People*, 45 N. Y. 215; *S. C.* 5 *Lansing*, 261; *Udderzook's case*, 76 Penn. St. 340; *S. C.* *Whart. on Homicide*, Appendix; *Shaible v. Ins. Co.* 9 Phil. R. 136; aff. 1 *Weekly Notes of Cases*, 369; *Luke v. Calhoun Co.* 52 Ala. 115.

See *Beers v. Jackman*, 103 Mass. 192, ruling that evidence of similarity was inadmissible in bastardy suits.

As to the secondary character of photographs, see *supra*, § 91.

The admission of photographs, as a means of identification, is thus dis-

cussed by a learned judge of the supreme court of Pennsylvania:—

“All the bills of exceptions, except one, relate to this question of identity, the most material being those relating to the use of a photograph of Goss. This photograph, taken in Baltimore, on the same plate with a gentleman named Langley, was clearly proved by him, and also by the artist who took it. Many objections were made to the use of this photograph, the chief being to the admission of it to identify Wilson as Goss; the prisoner's counsel regarding this use of it as certainly incompetent. That a portrait or a miniature, painted from life, and proved to resemble the person, may be used to identify him, cannot be doubted, though, like all other evidences of identity, it is open to disproof or doubt, and must be determined by the jury. There seems to be no reason why a photograph, proved to be taken from life, and to resemble the person photographed, should not fill the same measure of evidence. It is true, the photographs

admitted when relevant;¹ though the impression they give of depths and distances may require to be corrected *aliunde* by measurement.² Such photographs, also, must be verified by proof that they are true representations before they can be admitted by the court.³ Photographs of handwriting are in like manner admissible;⁴ though in cases involving delicate questions of identity of hands, a photograph should not be relied on without investigating the refractive power of the lens, the angle at which the original was inclined to the sensitive plane, the accuracy of the focussing, and the skill of the operator.⁵ Engrav-

we see are not the original likenesses; their lines are not traced by the hand of the artist, nor can the artist be called to testify that he faithfully limned the portrait. They are but paper copies taken from the original plate, called the negative, made sensitive by chemicals, and printed by the sunlight through the camera. It is the result of art, guided by certain principles of science.

“In the case before us, such a photograph of the man Goss was presented to a witness who had never seen him, so far as he knew, but had seen a man known as Wilson. The purpose was to show that Goss and Wilson were one and the same person. It is evident that the competency of the evidence in such a case depends on the reliability of the photograph as a work of art, and this, in the case before us, in which no proof was made, by experts, of this reliability, must depend upon the judicial cognizance we may take of photographs, as an established means of producing a correct likeness. The Daguerrean process was first given to the world in 1839. It was soon followed by photography, of which we have had nearly a generation's experience. It has become a customary and a common mode of taking and preserving views, as well as the likenesses of persons, and has obtained universal assent to

the correctness of its delineations. We know that its principles are derived from science; that the images on the plate, made by the rays of light through the camera, are dependent on the same general laws which produce the images of outward forms upon the retina through the lenses of the eye. The process has become one in general use, so common that we cannot refuse to take judicial cognizance of it as a proper means of producing correct likenesses.” Agnew, C. J., *Udderzook v. Commonwealth*, 76 Penn. St. 352, 353.

¹ *Cozzens v. Higgins*, 1 Abb. (N. Y.) App. 451; *Church v. Milwaukee*, 31 Wisc. 512.

² *Tichborne Trial*, Cockburn, C. J., Charge, ii. 640.

³ *Marcey v. Barnes*, 16 Gray, 161; *Hollenbeck v. Rowley*, 8 Allen, 473; *Com. v. Coe*, 115 Mass. 481; *Walker v. Curtis*, 116 Mass. 98; *Blair v. Pelham*, 118 Mass. 420; *Ruloff v. People*, 45 N. Y. 215.

⁴ *Marey v. Barnes*, 16 Gray, 161. *Infra*, § 720.

⁵ *Taylor Will case*, 10 Abb. N. Y. Pr. N. S. 300; *Tome v. R. R.* 39 Md. 36, quoted *infra*, § 716. See *Daly v. Maguire*, 6 Blatch. 137.

In *Foster's Will*, Sup. Ct. of Michigan, Ap. 1876 (8 Am. Law Times Rep. 412), Campbell, J., said:—

“If the court had permitted photo-

ings of scientific results may, it seems, be admitted to illustrate an argument.¹ But as to all forms of pictorial or photographic representation, whether the representation is correct must be determined by the court before it can be received; and the ruling of the court below in this respect is not, it is said in Massachusetts, open to exception in error.²

graphic copies of the will to be given to the jury, with such precautions as to secure their identity and correctness, it might not, perhaps, have been error. Nevertheless, it is not always true that every photographic copy would be safe on any inquiry requiring minute accuracy. Few copies can be so satisfactory as a good photograph. But all artists are not competent to make such pictures on a large scale, and all photographs are not absolutely faithful resemblances. It is quite possible to tamper with them, and an impression, which is at all blurred, would be very apt to mislead on questions of handwriting, where forgery is claimed. Whether it would or would not be permissible to allow such documents to be used, their use can never be compulsory. The original, and not the copy, is what the jury must act upon, and no device can properly be allowed to supersede it. Copies of any kind are merely secondary evidence, and, in this case, they were intended to be used as equivalent to primary evidence in determining the genuineness of the primary document."

¹ *Ordway v. Haynes*, 50 N. H. 159.

² "A plan or picture, whether made by hand of man, or by photography, is admissible in evidence, if verified by proof that it is a true representation of the subject, to assist the jury in understanding the case. *Marey v. Barnes*, 16 Gray, 161; *Hollenbeck v. Rowley*, 8 Allen, 473; *Cozens v. Higgins*, 1 Abbott N. Y. 451; *Ruloff v. People*, 45 N. Y. 213; *Udlerzook v. Commonwealth*, 76 Penn.

St. 340; *Church v. Milwaukee*, 31 Wisc. 512. Whether it is sufficiently verified is a preliminary question of fact, to be decided by the judge presiding at the trial, and not open to exception. *Commonwealth v. Coe*, 115 Mass. 481, 505." *Walker v. Curtis*, 116 Mass. 98.

In illustration of the use of photography, in connection with the production of evidence, the following cases, for which I am indebted to an eminent scientist, will be of value.

"In the case of the Rumford Chemical Works *v. Hecker*, 11 Blatch. 552, the question was raised as to the relative porosity of bread made with yeast in the usual manner, and that prepared with the baking powder of the complainants. Evidence was introduced by defendants as follows: President Henry Morton, of the Stevens Inst. of Technology, Hoboken, N. J., who organized the photographic observations of the eclipse of 7th August, 1869, under the Nautical Almanac Office, and otherwise an expert in photography, was produced, and deposed to having prepared sections of both varieties of bread of exactly equal thickness, and to having made microscopic or highly enlarged photographs of the same, under identical conditions. The original negatives of these, and also positive prints from the same, were received and filed as exhibits.

"In the case of *H. D. Cone v. Porter & Bambridge*, a question being raised as to the identity in character in embossed lines on writing paper claimed to infringe a patent for such lines

§ 677. Secondary evidence may be received of buildings, monuments, and other objects which cannot be brought into court. For this purpose, authenticated plans or

when made of an 'ogee' form, the same expert above named was produced, and deposed to having prepared slips of each variety of paper under consideration, attaching the same side by side in the four positions, which would give every possible variety to the arrangement of light and shade in the experiment, and then making photographs of the entire sheet, or card, with a very oblique illumination.

"By this means the variations of surface in the embossed lines was strongly marked by light and shade, and the identity or difference of the various samples clearly shown.

"In the case of *Funcke v. N. York Mutual Life Insurance Co.*, in 1876, in the superior court of New York city, a question arose as to the alteration of a check from \$100 to \$1,500. The alteration had been confessed by a notorious forger, who had been employed to make it, but who was under sentence for another offence. Photographs were exhibited, showing decided traces of the original writing, especially of the word "One," under the newly written "Fifteen." It was objected that these traces of the original writing, which were not visible on the check itself, were also invisible on certain of the photographs. It has been suggested to us by President Morton, that this was probably due to a too long exposure of the negatives not showing the traces. The ink, which had been obliterated by the use of dilute sulphuric acid and hypochloride of soda (Labaraque's solution), had left only a very faint trace of oxide of iron, which, by reason of its yellow color, would have a special absorbing power for the actinic or photographic

rays, but yet even in this regard the difference between this remnant of the ink and the white paper was very slight, and if the exposure was at all too long, even the yellow traces reflected light enough to render the negative film opaque. It was therefore necessary that *just time enough* should be given to allow the white paper to produce its effect, when the slightly yellow parts would be distinguishable by their inferior action."

The following is from the Albany Law Journal of June 10, 1876:—

"A novel application of the art of photography was made in a cause on trial before Mr. Justice Dykman, in the supreme court circuit, New York, on Friday, June 2, 1876. The question at issue was, whether the certification of a check, purporting to have been made by the teller of the bank on which it was drawn, was genuine, or a forgery. The teller swore that it was not his certificate, and several experts pronounced the signature a forgery; while other experts, called by the holder of the check, were equally positive that the signature was genuine. Thereupon the court room was darkened, and 'Prof. Combs,' with the aid of a calcium light magic lantern, threw an image, from a photographic negative, of the check in question, upon the wall, to show that the writing was free and flowing, and not the labored and retouched signature, which is the usual accompaniment of forgeries, and which some of the experts insisted appeared in this case. This exhibit seems to have had the desired effect, as the jury found that the signature was genuine." See *Infra*, § 720.

diagrams of the *locus in quo* are admissible; ¹ and may go to the jury.²

X. SHOP-BOOKS.

§ 678. By the Roman law, as is elsewhere noticed, the book of original entries kept by a shop-keeper, when verified by his oath, is *primâ facie* evidence of the sales or other immediate business transactions it notes. This rule now exists in those European states in which the Roman law is in force.³ In England, a statute passed in 1609 recognized a similar admissibility of tradesmen's books; but this statute appears never to have been acted on by the courts, though in 1863 it was "revivified and rendered perpetual."⁴ Independent, however, of these statutes, shop-books, we are told, have been admitted as *primâ facie* evidence in cases "where accounts have been required to be taken, and vouchers have been lost."⁵ By the Chancery Amendment Act, courts of equity are empowered to direct that in taking accounts, the book in which the accounts required to be taken have been kept shall be *primâ facie* proof.⁶ In the United States, a tradesman's book of original entries is, in most jurisdictions, received in evidence as *primâ facie* proof, when supported by the tradesman's oath.⁷

Shop-books admissible when verified by oath of party.

¹ Jones v. Tarleton, 9 M. & W. 84; R. v. Fursey, 6 C. & P. 84; Wood v. Willard, 36 Vt. 81; Blair v. Pelham, 118 Mass. 420; Stuart v. Binsse, 10 Bosw. (N. Y.) 436; Vilas v. Reynolds, 6 Wise. 214; Shook v. Pate, 50 Ala. 91. See several instances given in Bemis's Webster Trial.

² "The submission to the jury of the plan, unaccompanied by the testimony of the surveyor who made it, and of the complainant, 'not as an accurate plan of the premises,' but as 'showing generally the situation and area of the premises flowed,' was within the discretion of the presiding officer. Hollenbeck v. Rowley, 8 Allen, 473; Clapp v. Norton, 106 Mass. 33; Commonwealth v. Holliston, 107 Mass. 232." Gray, J., Paine v. Woods, 108 Mass. 168.

³ See Wharton Conf. of Laws, §§ 753-56.

⁴ Taylor's Evidence, § 641.

⁵ Lodge v. Prichard, 3 De Gex, M. & G. 908.

⁶ Taylor's Ev. § 641, B.

⁷ Prince v. Smith, 4 Mass. 455; Ball v. Gates, 12 Mete. 491; Swift v. Pierce, 13 Allen, 136; Case v. Potter, 8 Johns. R. 211; Linnell v. Sutherland, 11 Wend. 568; Poultney v. Ross, 1 Dall. 239; Linn v. Naglee, 4 Whart. R. 92; Funk v. Ely, 45 Penn. St. 444; Fitzgibbon v. Kinney, 3 Harr. (Del.) 317; Myer v. Grafflin, 31 Md. 350; Kerr v. Love, 1 Wash. (Va.) 172; James v. Richmond, 5 Ohio, 338; Karr v. Stivers, 34 Iowa, 123; Winne v. Nickerson, 1 Wise. 1; Sherwood v. Sissa, 5 Nev. 349. In Michigan by statute. Morse v. Congdon, 3 Mich. 549. In

Even a marshal's book of private original entries has been held admissible to prove his sales.¹ In North Carolina, under the statute, book accounts, supported by party's oath, are only proof of small debts, when delivery is proved *aliunde*.² In Maine, such books, in the handwriting of the party himself, are only admissible to the extent of forty shillings,³ or after the death of the party, on proof of his handwriting.⁴

§ 679. It must at the same time be kept in mind that by the statutes enabling parties to be witnesses, books of original entries have lost the peculiar significance formerly attached to them. Under such statutes they are not simply exceptionally admissible, by statute or custom, but are generally admissible, under the rule that a witness may refresh his memory by proper memoranda.⁵ "Questions in relation to book entries as evidence," as is well said by the supreme court of Pennsylvania in 1875,⁶ "since the Act of 1869 making the parties witnesses, stand upon a different footing than that on which they stood before. Then the book itself was the evidence, and the oath of the party was merely supplementary. Now the party himself is a competent witness, and may prove his own claim as a stranger would have done before the Act of 1869. That the facts contained in the book, either of charge or dis-

Iowa by statute. *Anderson v. Ames*, 6 Iowa, 486; *Foster v. Sinkler*, 1 Bay S. C. 40; *Herlock v. Riser*, 1 McCord, 481; *Thompson v. Porter*, 4 Strob. Eq. 58; *Landis v. Turner*, 14 Cal. 573; *Bower v. Smith*, 8 Ga. 74. As to statute, see *Ganahl v. Shore*, 24 Ga. 17. In Florida by statute. *Hooker v. Johnson*, 6 Fla. 730; *Moody v. Roberts*, 41 Miss. 74; *Johnson v. Price*, 3 Head, 549; *Irwin v. Jordan*, 7 Humph. 167; *Forsee v. Matloek*, 7 Heisk. 421; *Ward v. Wheeler*, 18 Tex. 249; *Taylor v. Coleman*, 20 Tex. 772; *Burleson v. Goodman*, 32 Tex. 229. *Contra*, *Edwards v. Nichols*, 3 Day, 16; *Nolley v. Holmes*, 3 Ala. 642; *Scott v. Coxe*, 20 Ala. 294; *Godbold v. Blair*, 27 Ala. 592; *Richardson v. Dorman*, 28 Ala. 679. Otherwise when allowed by Code. *Hissrick v. McPherson*, 20

Mo. 310; *Burr v. Byers*, 10 Ark. 398.

¹ *Linthicum v. Remington*, 5 Cranch C. C. 546.

² *Alexander v. Smoot*, 13 Ired. 461.

³ *Dunn v. Whitney*, 1 Fairf. 9; *Kelton v. Hill*, 58 Me. 114.

⁴ *Leighton v. Manson*, 14 Me. 208; *Dow v. Sawyer*, 29 Me. 117. See, for a more extended rule, *Codman v. Caldwell*, 31 Me. 560; *Lord v. Moore*, 37 Me. 208. As to limit in New Hampshire, see *Dodge v. Morse*, 3 N. H. 232; *Bassett v. Spofford*, 11 N. H. 167; *Rich v. Eldredge*, 42 N. H. 153.

⁵ See this rule discussed *supra*, § 516.

⁶ *Nichols v. Haynes*, 78 Penn. St. 174. See *Barnet v. Steinbach*, 1 Weekly Notes, 335; *Henry v. Martin*, 1 Weekly Notes, 277.

charge, of cash or goods, or whatever else is in his personal knowledge, might be proved by a stranger, no one doubts. A clerk, for instance, could prove the account, including cash items, from his own knowledge, and might use the book to refresh his memory. The party now stands, by force of the law, on the same plane of competency as the stranger stood upon, and therefore may make the same proof. As a stranger could, he may also refer to entries made at the time of the transaction in corroboration of his testimony."

§ 680. Such entries are used to refresh the memory of the party swearing to them, and it is not necessary, therefore, that he should have an independent recollection of the facts they narrate.¹

Not necessary that witness should have independent recollection.

§ 681. The charge proved must be in connection with the party's daily business, and not an insulated independent item.² Thus a tradesman's book of original entries is not admissible to prove an item for money loaned.³ In South Carolina, it has been held that the statute authorizing a party to make proof by swearing to his books of original entry does not apply to a schoolmaster,⁴ nor to a planter,⁵ nor to a scrivener,⁶ nor to the keeper of a billiard-table.⁷

Charge must be in party's business.

¹ *Supra*, § 518.

"In *Merrill v. The Ithaca & Owego Railroad Company*, 16 Wendell, 586, it was held that when original entries are produced, and the person who made them, and knew them at the time to be true, testified that he had made the entries, and that he believed them to be true, although at the time of testifying he had no recollection of the facts set forth in the entries, such evidence is admissible as *prima facie* evidence for the jury. In this case, Mr. Justice Cowan, who delivered the opinion of the court, examined most of the authorities, English and American, on the subject. The same doctrine is also sustained by the case of *Guy v. Mead*, 22 N. Y. 465." *Nelson, J., Insurance Company v. Weide*, 9 Wall. 677, 680, 681. *S. P., Wolcott v. Heath*, 78 Ill. 433.

² *Winson v. Dillaway*, 4 Mete. 221; *Corning v. Ashley*, 4 Denio, 354; *Curren v. Crawford*, 4 Serg. & R. 6; *Shoemaker v. Kellog*, 11 Penn. St. 310; *Karr v. Stivers*, 34 Iowa, 123; *Lynch v. McHugo*, 1 Bay, S. C. 33.

³ *Wilson v. Wilson*, 1 Halst. 95; *Carman v. Dunham*, 6 Halst. 189; *Ducoign v. Schreppel*, 1 Yeates, 347; *Veiths v. Hagge*, 8 Iowa, 163; *Cole v. Dial*, 8 Tex. 317. As to limit in Massachusetts of \$6.66, in charges of cash, see *Union Bank v. Knapp*, 3 Pick. 109; *Davis v. Sanford*, 9 Allen, 216.

⁴ *Pelzer v. Cranston*, 2 McCord, 328.

⁵ *Geter v. Comm.* 1 Bay, 354.

⁶ *Watson v. Bostwick*, 2 Bay, 312.

⁷ *Boyd v. Ladson*, 4 McCord, 76.

So it has been ruled in Tennessee, that where the services in controversy were such as to raise no presumption that compensation was to be rendered therefor, — consisting in attention to an aged father in his last sickness, — it was not competent for the plaintiff to show by his own oath that the services were performed under a promise of the deceased that they should be well paid for.¹

§ 682. The book proved must be one of original entry; a ledger, or other book into which such entries are transcribed, is inadmissible.² That the book is in ledger form is no objection.³ It has been held, however, that the fact that entries are first made on a slate, and then transferred to the book offered, does not exclude the book, when the slate entries are not preserved, and the transfer is immediate.⁴ But where the slate entries are relied on by the party as in any sense original entries, then the book assumes a secondary character, and is inadmissible.⁵ The distinction is this: memoranda made in rough on a slate, or on a mere temporary note-book, of which the object is merely to assist the memory until the entries are made in a day-book, are not books of original entry, and need not be produced; nor do they make the day-book secondary evidence. Where, however, such memoranda are made as permanent records of the sale, then they constitute a book of original entries, and must be produced.⁶ The day-book, or blotter, as it is sometimes called, on the other hand, and into which such

¹ *Forsee v. Matlock*, 7 Heisk. 421.

² *Dwinel v. Pottle*, 31 Me. 167; *Godfrey v. Codman*, 32 Me. 162; *Faxon v. Hollis*, 13 Mass. 427; *Morris v. Briggs*, 3 Cush. 342; *Whitney v. Sawyer*, 11 Gray, 242; *Stetson v. Wolcott*, 15 Gray, 545; *Bentley v. Ward*, 116 Mass. 333; *Case v. Potter*, 8 Johns. R. 211; *Burke v. Wolfe*, 38 N. Y. Sup. Ct. 263; *Stroud v. Tilton*, 4 Abb. (N. Y.) App. 324; *Kotwitz v. Wright*, 37 Tex. 82; *Wall v. Dovey*, 60 Penn. St. 212; *McCormick v. Elston*, 16 Ill. 204; *Karr v. Stivers*, 34 Iowa, 123; *Marsh v. Case*, 30 Wis. 531; *Lynch v. Petrie*, 1 Nott & McC. 130; *Toomer v. Gadsden*, 4 Strobb.

193; *Lawhorn v. Carter*, 11 Bush, 7; *Neville v. Northcutt*, 7 Coldw. 294.

³ *Wells v. Hatch*, 43 N. H. 246; *Rodman v. Hoops*, 1 Dall. 85; *Thomson v. Hopper*, 1 W. & S. 468; *Hoover v. Gehr*, 62 Penn. St. 138.

⁴ *Hall v. Glidden*, 39 Me. 445; *Pillsbury v. Locke*, 33 N. H. 96; *Faxon v. Hollis*, 13 Mass. 427; *Hartley v. Brookes*, 6 Whart. R. 189; *Ewart v. Morrell*, 5 Harr. (Del.) 126; *Landis v. Turner*, 14 Cal. 573.

⁵ *Kessler v. McConachy*, 1 Rawle, 435; *Forsythe v. Norcross*, 5 Watts, 432. See *Davidson v. Powell*, 16 How. (N. Y.) 467.

⁶ *Ibid.*; *Breinig v. Meitzler*, 23 Penn. St. 156.

memoranda are entered, is virtually the book of original entries, and must be produced, or its loss accounted for.¹ Entries in books kept for other purposes have been held inadmissible.² The entries must be in a book used continuously for the purpose;³ but a book of original entries is not vitiated by the fact that it contains entries not original.⁴ In case of the loss of the book of original entries, a transcript, or the ledger, has been received.⁵

§ 683. Freshness of entering is essential; the entries must be made as soon after the transaction as is consistent with the due course of business, and in the handwriting of the party by whom they are proved. Each item must be severally entered when this is conformable to the nature of the transaction.⁶ If the entry is made before the sale or delivery is complete, it cannot be received.⁷ But an employer may charge for his employee's services by the job;⁸ and it has been held that when an employee is in constant employment for a year, an entry once a week is sufficient.⁹ When made by a salesman, and reported to the principal, who enters them, his en-

The entries must have been contemporaneous.

¹ Breinig v. Meitzler, 23 Penn. St. 156.

² Rogers v. Old, 5 Serg. & R. 404; Smith v. Lane, 12 Serg. & R. 80.

³ Kibbe v. Bancroft, 77 Ill. 18.

⁴ Ives v. Niles, 5 Watts, 323.

⁵ Breinig v. Meitzler, 23 Penn. St. 156; Holmes v. Marden, 12 Pick. 169; Caulfield v. Sanders, 17 Cal. 569.

⁶ Lord v. Moore, 37 Me. 208; Luce v. Doane, 38 Me. 478; Cummings v. Nichols, 13 N. H. 420; Earle v. Sawyer, 6 Cush. 142; Keith v. Kibbe, 10 Cush. 35; Gorman v. Montgomery, 1 Allen, 416; Dexter v. Booth, 2 Allen, 559; Com. v. Goodwin, 14 Gray, 55; Bentley v. Ward, 116 Mass. 333; Swing v. Sparks, 2 Halst. 59; Vance v. Caldwell, 1 Yeates, 321; Jones v. Long, 3 Watts, 325; Lonergan v. Whitehead, 10 Watts, 249; Venning v. Hacker, 2 Hill S. C. 581; Bower v. Smith, 8 Ga. 74; Holliday v. Butt, 40 Ala. 178; Lynch v. Petrie, 1 Nott & McC. 130; Townsend v. Coleman, 18

Tex. 418; Taylor v. Coleman, 20 Tex. 772; Hooker v. Johnson, 6 Fla. 730.

See, for a liberal rule as to a physician's charges, Clarke v. Smith, 46 Barb. 30; Bay v. Cook, 22 N. J. L. 343. "Three months' service," in a single entry, do not form an admissible charge. Henshaw v. Davis, 5 Cush. 145. In Bolton's Appeal, 3 Grant (Penn.), 204; and Koch v. Howell, 6 Watts & S. 350, it was ruled that a paper-hanger's book of original entries could be admitted when the entry was made as soon as the quantity of paper was determined from its use, and the amount of work was measured.

⁷ Parker v. Donaldson, 2 Watts & S. 9; Rheem v. Snodgrass, 2 Grant (Penn.), 379.

⁸ Bolton's Appeal, 3 Grant (Penn.), 204.

⁹ Yearsley's Appeal, 48 Penn. St. 531.

tries have been treated as original,¹ and so when the goods are delivered by one person, and the entries made by another.² But ordinarily the party making his entry must swear to his own writing.³ Where a witness cannot be certain whether or no the entry was written by himself, or by whom it was written, it cannot be used as evidence.⁴

§ 684. The book offered must be on its face regular. Mutilated memoranda cannot constitute a book of original entries. The entry must be complete in itself.⁵ Sheets of paper, however, on which, when separate, entries have been made, have been received.⁶ The entries must be fair, and free from suspicious alteration.⁷ But alterations or errors in one point, unless showing fraud, do not exclude other portions.⁸

Paper is not essential to the admissibility of book entries, if the instrument be kept for the especial purpose. Thus a notched stick, such being the usage of the particular business, has been

¹ Taylor v. Tucker, 1 Ga. 231.

² Kline v. Gundrum, 11 Penn. St. 242; Schollenberger v. Seldonridge, 49 Penn. St. 83; Long v. Conklin, 75 Ill. 32.

³ Douglass v. Hart, 4 McCord, 257; Harris v. Caldwell, 2 McMull. 133; Wheeler v. Smith, 18 Wise. 651.

It must be kept in mind, that when the party is a general witness, he may swear to the facts, merely refreshing his memory by the entries. *Supra*, §§ 516, 526.

⁴ Halsey v. Sinsebaugh, 15 N. Y. 485; Gilchrist v. Grocers' Co. 59 N. Y. 495.

The oath, in this relation, is indispensable. "Except in the action of book debt, and kindred proceedings in law and equity for the adjustment of matters of account, we believe this kind of evidence has never been received without the clerk or person making the entries, if living and within the jurisdiction, was called to verify them. If dead, or beyond reach, or incompetent, his testimony is dispensed with *ex necessitate*." Phelps, J., Bartholomew v. Farwell, 41 Conn. 109.

⁵ Gale v. Norris, 2 McLean, 469; Richardson v. Emery, 23 N. H. 220. See Mathes v. Robinson, 8 Metc. 269; Hart v. Livingston, 29 Iowa, 217; Thayer v. Deen, 2 Hill S. C. 677; McKewn v. Barksdale, 2 Nott & M. 17; Cheever v. Brown, 30 Ga. 904; Hand v. Grant, 13 Miss. 508; Neville v. Northcut, 7 Coldw. 294.

⁶ Hooper v. Taylor, 39 Me. 224; Smith v. Smith, 4 Harr. (Del.) 532; Taylor v. Tucker, 1 Ga. 231; though see, *contra*, Jones v. Jones, 21 N. H. 219; Thompson v. McKelvey, 13 Serg. & R. 126.

⁷ *Supra*, § 622. Sargeant v. Pettibone, 1 Aik. 355; Lloyd v. Lloyd, 1 Redf. (N. Y.) 399; Churchman v. Smith, 6 Whart. R. 146; Caldwell v. McDermit, 17 Cal. 464; Blake v. Lowe, 3 Desau. S. C. 263; Doster v. Brown, 25 Ga. 24.

⁸ Gosewich v. Zebbley, 5 Harr. (Del.) 124. See Gardner v. Way, 8 Gray, 189; Jones v. De Kay, 2 Pen. (N. J.) 955; Rodenbough v. Rosebury, 24 N. J. L. 491. See *infra*, § 1264.

received when verified by the party's oath.¹ So lead pencil entries may be received.²

§ 685. The efficiency of the charge is limited to the immediate transaction.³ Thus the consideration of a promissory note cannot be thus proved;⁴ nor a promise to pay by the defendant;⁵ nor the nature of the credit given; nor that credit was given to a particular person;⁶ nor can payments on notes of hand be so proved,⁷ nor a special contract of delivery.⁸ A vendee's books are inadmissible to disprove a sale and delivery to him.⁹

Charge must relate to immediate transaction.

§ 686. Books of original entry, in all matters except that of sale, are treated in some jurisdictions as secondary evidence, not to be received if better evidence (*e. g.* that of a salesman making the sale, or a clerk employed to keep accounts) is attainable.¹⁰ The same rule has been applied where the goods are delivered on a special contract.¹¹

Such books may be secondary.

§ 687. If the shop-book, from its face, appears to have been posted in a ledger, then, on application

When the plaintiff's case shows

¹ Rowland *v.* Burton, 2 Harr. (Del.) 288. See Kendall *v.* Field, 14 Me. 30; Davison *v.* Powell, 16 How. (N. Y.) 467. Supra, §§ 614-15.

² Hill *v.* Scott, 12 Penn. St. 168. See supra, § 618.

³ Alger *v.* Thompson, 1 Allen, 453; Batchelder *v.* Sanborn, 22 N. H. 325; Putnam *v.* Goodall, 31 N. H. 419; McMakin *v.* Birkey, 7 Phil. R. 90.

⁴ Rindge *v.* Breck, 10 Cush. 43.

⁵ Coffin *v.* Cross, 3 Dane Ab. 322; Keith *v.* Kibbe, 10 Cush. 35; Gorman *v.* Montgomery, 1 Allen, 416; Somers *v.* Wright, 114 Mass. 171.

⁶ Keith *v.* Kibbe, 10 Cush. 35; Gorman *v.* Montgomery, 1 Allen, 416; Somers *v.* Wright, 114 Mass. 171; Bentley *v.* Ward, 116 Mass. 333; Field *v.* Thompson, 119 Mass. 152. See supra, § 519; Tenbroke *v.* Johnson, 1 Coxe, 288; Poultney *v.* Ross, 1 Dall. 238; Kerr *v.* Love, 1 Wash. (Va.) 172.

⁷ Inslee *v.* Prall, 25 N. J. L. 465.

⁸ Nickle *v.* Baldwin, 4 Watts & S.

290; Winter *v.* Newell, 49 Penn. St. 507; McPherson *v.* Neuffer, 11 Rich. (S. C.) 267.

Even as to the real vendee the charge is only *prima facie* proof. "Evidence that the original charge on the plaintiff's books was to Rowell by name was *prima facie* only, and not conclusive, that the contract of hiring was made with Rowell. James *v.* Spaulding, 4 Gray, 451; Lee *v.* Wheeler, 11 Gray, 239; Commonwealth *v.* Jeffries, 7 Allen, 564." Gray, J., Banfield *v.* Whipple, 10 Allen, 30.

⁹ Keim *v.* Rush, 5 Watts & S. 377.

¹⁰ Watts *v.* Howard, 7 Mete. 478; Adams *v.* Steamboat Co. 3 Whart. R. 75; Jackson *v.* Evans, 8 Mich. 476; Waggemann *v.* Peters, 22 Ill. 42; Dodson *v.* Sears, 25 Ill. 513; Sloan *v.* Ault, 8 Iowa, 229; Slade *v.* Nelson, 20 Ga. 365.

¹¹ Nickle *v.* Baldwin, 4 Watts & S. 290; Shoemaker *v.* Kellog, 11 Penn. St. 300; Pritchard *v.* McOwen, 1 Nott & M. 131.

a transfer to a ledger, the ledger must be produced.

of a principle elsewhere stated,¹ the one is regarded as the complement of the other, and the ledger, if called for, must be produced.²

§ 688. It follows from what has been said, that in states where books of original entries are admissible upon the oath of the party, such books, after the party's death, may be received on the testimony of administrators, that the books of the decedent are in their possession, and that the books in question, being books of original entry, are in the decedent's handwriting, and among his books; they on their face showing that they were made in the regular course of business.³

¹ *Supra*, § 618.

² *Prince v. Swett*, 2 Mass. 569; *Bonnell v. Mawha*, 37 N. J. 199.

"The plaintiff sues by virtue of the statute, in his own name, as owner of a book of account, which had been assigned to him, the assignor having died. In order to substantiate this claim, certain books of original entries were produced, and duly proved at the trial. It further appeared that there were other books connected with the account in question, one of them being the ledger, into which the account had been carried. The books produced were overruled by the court on the ground that the evidence did not comprise all the books connected with the transaction. The present motion is, to set aside the nonsuit which resulted from this judicial action. In my opinion, the ruling of the judge, with respect to the evidence in question, was clearly right. The ledger was a part of the party's own record of the matter in suit. In the case of *Prince, Executor, v. Swett*, 2 Mass. 569, it appeared from marks in the day-book that the account had been transferred to the ledger, and the court said: 'When an account is transferred to a ledger from a day-book, the ledger should be produced, that the other party may have advantage of any items entered therein to

his credit.' To this extent the rule seems to be undisputed; that is, the ledger is a necessary part of the proof when it affirmatively appears that it contains entries relative to the affair in suit. Even the case of *Tindall v. McIntyre*, 4 Zab. 147, admits the rule in this restricted form, for it was there held that the ledger was immaterial, it not being shown that any of the accounts had been posted or credits entered in that book. Beyond this limit, the rule requiring the production of all the relevant books of the creditor ought not to be narrowed. Books of account are evidence of a party's own making, are open to much criticism, and, being violations of general principles, are admitted only on the ground of necessity. It is certainly requiring but little to exact that the whole of the entries made by the party should be presented in court. I entirely concur in the ruling at the circuit, that the fragment of evidence offered could not be received." *Beasley, C. J., Bonnell v. Mawha*, 37 N. J. 199.

³ See *Augusta v. Windsor*, 19 Me. 317; *Dodge v. Morse*, 3 N. H. 282; *Welsh v. Barrett*, 15 Mass. 380; *Van Swearingen v. Harris*, 1 Watts & S. 356; *Odell v. Culbert*, 9 W. & S. 66; *Hoover v. Gehr*, 62 Penn. St. 136; *Bently v. Hallenback*, *Wright (Oh.)*,

The same rule holds where the person making the entry is beyond reach or is incompetent.¹

XI. PROOF OF DOCUMENTS.

§ 689. Where a document is offered in evidence as executed by a particular person, it must ordinarily be proved to have been executed by such person.² When offered for a collateral purpose, a *primâ facie* proof of execution is sufficient.³ The execution of a paper so introduced may be proved, it is scarcely necessary to say, by the admission of the party, unless such proof is required by law to be by subscribing witnesses.⁴ Whether an admission can prove the contents of a paper is elsewhere discussed.⁵

§ 690. As will hereafter be more fully seen, proof of execution of a document is dispensed with when it is

Document to be proved by party offering.

Otherwise when produced by party

168; *Spence v. Sanders*, 1 Bay (S. C.), 119; *McBride v. Watts*, 1 McCord, 384. See *Nicholls v. Webb*, 8 Wheat. 326. See *Doe v. Turford*, 3 B. & Ad. 890; *Doe v. Skinner*, 2 Ex. 384; *Smith v. Blakey*, L. R. 2 Q. B. 328; and see fully *supra*, § 238.

¹ *Ibid.*; *Bartholomew v. Farwell*, 41 Conn. 107; *Bear v. Trexler*, 3 Notes of Cases (Penn.), 214.

"The book of a decedent appearing on its face to contain charges of merchandise sold and delivered, is admissible in evidence on proof of his handwriting alone. It is not necessary to accompany it with any evidence as to the time and manner in which the entries were made. This would, generally, be impossible, from the death of the only party having any knowledge of the matter. The presumption, *primâ facie*, is, that the book of a decedent was regularly kept, as a record of his daily transactions. If testimony is subsequently introduced, which raises any question upon the subject, it is for the jury to determine, under proper instructions from the court. *Van Swear-*

ingen v. Harris, 1 W. & S. 356; *Odell v. Culbert*, 9 *Ibid.* 66.

"There was nothing on the face of the book produced below to destroy this presumption. It was no valid objection that the account was kept in ledger form. *Rodman v. Hoop's Ex'rs*, 1 Dall. 85; *Thomson v. Hopper*, 1 W. & S. 468." *Sharswood, J.*, *Hoover v. Gehr*, 62 Penn. St. 138.

² *Supra*, § 357; *Pullen v. Hutchinson*, 25 Me. 249; *Dunlap v. Glidden*, 31 Me. 510; *Wallace v. Goodall*, 18 N. H. 439; *Hayden v. Thayer*, 5 Allen, 162; *Linn v. Ross*, 16 N. J. L. 55; *Granniss v. Irvin*, 39 Ga. 22; *Anderson v. Snow*, 8 Alab. 504; *Smith v. Scantling*, 4 Blackf. 443; *Owen v. Thomas*, 33 Ill. 320; *Cartmell v. Walton*, 4 Bibb, 488; *Gentry v. Doolin*, 1 Bush, 1; *Sinclair v. Wood*, 3 Cal. 98; *Watson v. Hopkins*, 27 Tex. 637.

³ *Means v. Means*, 7 Rich. (S. C.) 533.

⁴ *Wright v. Wood*, 23 Penn. St. 120; *Powell v. Adams*, 9 Mo. 758. *Infra* § 1095.

⁵ *Infra*, § 1091.

claiming
interest
under it.

produced, in obedience to notice, by the adverse party, who relies on it as part of his title.¹

§ 691.

Instru-
ments on
which suit
is brought
require no
proof un-
less denied
by affida-
vit.

In many jurisdictions, statutes exist which dispense with proof of instruments on which suit is brought, except in those cases in which the execution of the instrument is denied by the defendant under oath. By other statutes the plaintiff, who, on bringing suit, files an instrument of writing on which the suit is brought, is entitled to judgment on a specified day, unless the

defendant should, before such day, file an affidavit of defence. Unless in such affidavit the genuineness of the instrument is contested, such genuineness need not afterwards be proved by the plaintiff. We have, therefore, in such cases, adopted a remedy in some respects analogous to the Diffessions Oath (*jusjurandum diffessionis*) of the later Roman practice,² by which a party who does not deny on oath the genuineness of an instrument set up against him is assumed to concede such genuineness.³

§ 692.

Seals may
prove au-
thoriza-
tion.

A seal was in the mediæval practice essential to attest the intention of a party to bind himself by a document; and even witnesses in this way made their signatures. The seal was originally made by the impress

of a seal ring. In later times a stamp was used. As late as the twelfth century the word *annulus* was used as expressing a

¹ *Infra*, § 736; and see *supra*, §§ 152-160; *Jackson v. Wilkinson*, 17 Johns. R. 157; *St. John v. Ins. Co.* 2 Duer, 419; *Roger v. Hoskins*, 15 Ga. 270; *Herring v. Rogers*, 30 Ga. 615.

² Ortloff, *Jurist. Hand.* i. 60; Weiske, *Rechtslex.* xi. 681.

³ See *Carpzov. Jur. for. P. i. Const.* 10; *Endemann*, § 85.

As to rulings on the various statutory modifications of this principle, see *Libby v. Cowan*, 36 Me. 264; *Rape v. Westcott*, 3 Harr. (N. J.) 284; *Ring v. Foster*, 6 Ohio, 279; *Somers v. Harris*, 16 Ohio, 262; *Linn v. Buckingham*, 1 Scam. 451; *Illinois Ins. Co. v. Marseilles Co.* 6 Ill. 236; *Peoria R. R. v. Neill*, 16 Ill. 269;

Hurt v. McCartney, 18 Ill. 129; *Otto v. Jackson*, 35 Ill. 349; *Hardman v. Chamberlin*, 1 Morris (Iowa), 104; *Savery v. Browning*, 18 Iowa, 246; *Clinton Bank v. Torry*, 30 Iowa, 85; *Hinchliff v. Hinman*, 18 Wisc. 130; *Spicer v. Smith*, 23 Mich. 96; *Kelly v. Paul*, 3 Grat. 191; *Shepherd v. Frys*, 3 Grat. 442; *Madden v. Burris*, 1 Brev. 387; *Williams v. Rawlins*, 10 Ga. 491; *Singleton v. Gayle*, 8 Port. 270; *Holmes v. All*, 1 Mo. 419; *Foster v. Nowlin*, 4 Mo. 18; *Simms v. Lawrence*, 9 Mo. 657; *Jones v. Walker*, 5 Yerg. 427; *Austin v. Townes*, 10 Tex. 24; *May v. Pollard*, 23 Tex. 677; *McCollum v. Cushing*, 22 Ark. 540.

seal; afterwards came into use *sigillum, imago, imaginis signum secretum*. As substitutes for seals were sometimes used pieces of leather or of parchment, attached to the end of the writing, and on these pieces were drawn figures accepted as equivalent to the devices on seals. These figures were usually in notes; and hence persons so signing were called in the old books *nodatores*. In Germany, from the twelfth to the fifteenth century, seals, in one or other of these forms, were essential to give binding force to obligations or attestations.¹ By the English common law, they are still essential to the technical validity of bonds and deeds. But even by this law, they are now complements to, not substitutes for, the name of the party written by himself.²

§ 693. A sealed document has been held to be sufficiently executed, though there be but one seal actually attached to the signatures of several persons.³ Scrolls drawn by a pen, or stamped by a wooden block, have been held to constitute an adequate seal;⁴ when a seal, however, is self proving, it must be capable of exact identification.⁵ A distinct impression upon paper, without the application of wax or wafer, has been held sufficient, at common law, for a corporation seal.⁶ The averment, "witness my hand and seal," will not supply the actual absence of either seal or scroll,⁷ unless there is

Substantial identification is sufficient.

¹ See Spangenberg von Urkundenbeweise, i. 236.

² An able exposition of the history of seals, and the bearing of this history on our present practice, will be found in the argument of counsel in *Haven v. R. R.* 12 Allen, 337, afterwards published in 1 Am. Law Rev. 638. See *infra*, §§ 104-5.

³ *Lunsford v. Lead Co.* 54 Mo. 426.

⁴ *R. v. St. Paul's, Covent Garden*, 7 Q. B. 232; *Woods v. Banks*, 14 N. H. 101; *Dewling v. Williamson*, 9 Watts, 311; *Michenor v. Kinney, Wright* (Ohio), 459; *Underwood v. Dollins*, 47 Mo. 259; *State v. Thomson*, 49 Mo. 188; *Brooks v. Hartman*, 1 Heisk. 36. *Infra*, § 1313; though see *Blackwell v. Hamilton*, 47 Ala. 470. In New York, by statute (2 Fay's

Stat. 13), public seals may be made by a mere stamp on paper, but private seals "shall be made as heretofore on wafer, wax, or some similar substance."

⁵ *Infra*, § 695.

⁶ *Davidson v. Cooper*, 11 M. & W. 778; *Pillow v. Roberts*, 13 How. 472; *Woodman v. R. R.* 50 Me. 549; *Allen v. R. R.* 32 N. H. 446; *Manchester v. Slason*, 13 Vt. 334; *Hendee v. Pinkerton*, 14 Allen, 381; *Curtis v. Leavitt*, 15 N. Y. 9; *Corrigan v. Falls Co.* 3 Halst. Ch. 489. But printing of fac-similes of corporation seals, such printing being done in gross by the usual process of a printing-press, has been held, in Massachusetts, not to be a seal. *Bates v. R. R.* 40 Allen, 251.

⁷ *Chilton v. People*, 66 Ill. 501.

ground to infer that a seal had been attached, but is effaced.¹ But where seals are a superfluity, they may be treated as a nullity.² A seal of an agent may be deemed, in contemplation of law, the seal of the principal;³ but it is otherwise, as we will see when the principal (a corporation) has an official seal, and the agent affixes what he describes as his private seal.⁴

§ 694. For a corporation, a seal is the technically correct mode of executing a document, and the seal of the corporation is *primâ facie* proof of due execution.⁵ At the same time it must be remembered the strict rule of the common law in this respect has been much relaxed in England, and still more in the United States. In England, the modern practice is thus stated by Rolfe, B.: "A corporation which has a head may give a personal command and do small acts: as, it may retain a servant; it may authorize another to drive away cattle, damage-feasant, or make a distress, or the like. These are all matters so constantly recurring, or of so small importance, or so little admitting of delay, that, to require in every such case the previous affixing of the seal, would be greatly to obstruct the every day ordinary convenience of the body corporate, without any adequate object. In such matters, the head of the corporation seems from the earliest times to have been considered as delegated by the rest of the members to act for them."⁶ It has, however, been held, that although a business corporation may employ subordinate servants by writings not under seal, it is otherwise with municipal and semi-municipal corporations; and that the contract for the engagement of a clerk to a master of a workhouse by a board of guardians must be under seal.⁷ But even in England, it is held that a contract not

¹ Crawford Peer. 2 H. of L. Cas. 534; Sandilands, in re, L. R. 6 C. P. 411. See *infra*, § 1313.

² Blanchard v. Blackstone, 102 Mass. 343.

³ Savings Bk. v. Davis, 8 Conn. 200.

⁴ Tippits v. Walker, 4 Mass. 597; Geary v. Kansas, 61 Mo. 379; Randall v. Van Vechten, 19 Johns. 60; Dubois v. Canal Co. 4 Wend. 285; Mann v. Pentz, 2 Sandf. Ch. 271.

⁵ Doe v. Chambers, 4 A. & E. 410; S. C. 6 N. & M. 539; St. John's Ch. v. Steinmetz, 18 Penn. St. 273; Barton v. Wilson, 9 Rich. (S. C.) 273. See, also, Angell & Ames on Corp. (10th ed.) § 224; Burrill v. Bk. 2 Metc. 166; Com. Bk. v. Kortright, 22 Wend. 348; Berks. T. R. v. Myers, 6 S. & R. 12.

⁶ Mayor of Ludlow v. Charlton, 6 M. & W. 821.

⁷ Austin v. Guardians of Bethnal

under seal binds in all matters incidental to the objects of the corporation. Thus seals are not necessary to contracts to repair the premises of the corporation,¹ to buy or sell such goods as the corporation is formed to buy and sell,² to purchase goods for its purposes.³ To bills of exchange, by corporations, seals are clearly unnecessary.⁴ On the other hand, when the goods to be supplied are not such as those in which the corporation usually deals;⁵ or when the contract is of such a magnitude, and of such an unusual description, as to require reasonably the formal and express assent of the corporation, the fact must be proved by writing under the corporate seal;⁶ though it is conceded that magnitude *per se* is not an element in deciding whether a contract not under seal is binding on the corporation.⁷ So, also, it must be kept in mind, that "although corporations can only contract under seal, they are bound by their conduct, and by the acts of their solicitors, after their contract, just as an individual would be;"⁸ and so in torts. But the rule, whose ligatures in England are gradually dissolving, has in the United States ceased to exist; and with us the practice is, to require the affixing of a seal only in cases of the transfer of real estate, or in the appointment of officers to consummate such transfer; and corporations are held liable on contracts made by mere resolution of their directors, without a seal, or by order of their agents, to whose appointment no seal has been attached.⁹ The private seal of the agent, as we

Green, L. R. 9 C. P. 91; 43 L. J. C. P. 100; 22 W. R. 406; cf. Dyte v. Guardians of St. Pancras, 27 L. T. N. S. 342; Powell's Evidence, 4th ed. 365. See Whart. on Agency, § 59 *et seq.*

¹ Saunders v. St. Neot's Union, 8 Q. B. 810.

² Church v. Imperial Gaslight & Coke Co. 6 A. & E. 846.

³ South of Ireland Colliery Co. v. Waddle, L. R. 3 C. P. 463; L. R. 4 C. P. 617; 37 L. J. C. P. 211; 38 L. J. C. P. 338.

⁴ Murray v. East India Co. 5 B. & A. 204.

⁵ Copper Miners' Co. v. Fox, 16 Q. B. 229.

⁶ Homersham v. Wolverhampton Railway Co. 6 Exch. 137.

⁷ Per Erle, J., Henderson v. Australian Steam Navigation Co. 5 E. & B. 409.

⁸ Per Lord St. Leonards, Eastern Counties Railway Co. v. Hawkes, 5 H. L. Cas. 376.

⁹ Bank Col. v. Patterson, 7 Cranch, 305; Bank U. S. v. Dandridge, 12 Wheat. 68; Maine Co. v. Longley, 14 Me. 444; Lime Rock Bk. v. Macomber, 29 Me. 564; White v. Man. Co. 1 Pick. 215; Peterson v. Mayor, 17 N. Y. 449; McGargell v. Coal Co. 4 W. & S. 424; Bank of Ky. v. Sch. Bk. 1 Parsons Eq. Cas. 251; Elysville

have seen,¹ cannot be substituted for the official seal of the corporation. It is otherwise, however, when the seal is not distinctively that of the agent, but is described in the document as the seal of the corporation.² But it is not essential that the seal attached should be technically the corporate seal. For the purpose of a deed, the corporation may adopt a private seal, though it is essential that the document should aver, "under their seal."³

The record copy of a deed is not fatally defective because it does not copy the seal of the acknowledgment of the original.⁴

§ 695. As we have already seen, a public document, verified by an official seal, is infra-territorially proved by such seal.⁵ The law assumes that the public seals of the state are known to all its judicial officers; nor, in view of the heavy penalties imposed on the falsification and forgery of such seals, will it be supposed, without proof, that any particular seal is either counterfeit, or impressed irregularly. Hence, it is the duty of a judge to hold that a writing duly authenticated by a public seal is genuine, until the contrary be proved. If, however, a seal is so defaced as to be uncertain, evidence may be received to determine its genuineness.⁶ Even a foreign sovereign's seal has been allowed, from the necessity of the case, to be *primâ facie* proof of its own authenticity.⁷ When a seal is so offered, it must be distinguishable;⁸ or at least capable of verification by parol.

§ 696. What force is to be assigned to the use of a mark, as distinguished from the writing of a name, depends upon the circumstances in which the mark is used. That a mark may, in a proper case, bind the party making it,

v. Okisko, 1 Md. Ch. 392; and other cases cited Ang. & Ames on Corp. (10th ed.) § 238; Whart. on Agen. § 59.

¹ See authorities in last note of § 693.

² *Flint v. Clinton*, 12 N. H. 433; *Mill Dam v. Hovey*, 21 Pick. 428; *Susquehanna Bridge v. Ins. Co.* 3 Md. 305; *Phillips v. Coffee*, 17 Ill. 154.

³ *Jones v. Galway Commis.* 11 Ir. Law, 435, cited Taylor's Ev. § 128.

As to form of corporate seal, see *supra*, § 1313.

⁴ *Geary v. Kansas*, 61 Mo. 379; citing *Hedden v. Overton*, 4 Bibb, 406; *Griffin v. Sheffield*, 38 Miss. 359; *Sneed v. Ward*, 5 Dana, 187; *Smith v. Dall*, 13 Cal. 510.

⁵ See fully for authorities *supra*, § 319.

⁶ *Weiske*, Rechtslex. xi. 678. See *supra*, § 693.

⁷ *Supra*, § 319.

⁸ *The Atlantic*, 1 Abb. Adm. 451.

is illustrated in the Roman law by more than one ruling. An inventory, for instance, must, to be effective in that law, be signed by the heir ; and this signature, it is determined, may be made, when the heir cannot write, by his making the sign of the cross under the inventory, such mark being attested by a *tabularius* (registrar) who signs for him, in the presence of witnesses.¹ It is subsequently provided that when a contracting party is incapable of writing, and signs his mark, this mark must be countersigned by a *tabularius* in the presence of witnesses.² A mark, therefore, is by the Roman law recognized as equivalent, when a person cannot write, to the writing of his name ; but to prevent fraud or mistake, this mark must be peculiarly attested. In the Middle Ages, seals, and then scrolls, were accepted, as we have seen, as substitutes for autographic names ; and as the art of writing was then confined to a very few, documents were considered binding on parties who attached to them their seals. In our own times, although it has been argued with much force that a mark, instead of a seal, or of an autographic name, is no signature,³ we may consider the following positions as established :

1. A party who intelligently makes a mark, in place of writing his own name, binds himself, as to parties *bonâ fide* accepting the document on the faith of such mark.⁴

2. When a document is produced in evidence, purporting to be signed by a third party, who is proved, or can be presumed, to be unable to write his name, such mark, if shown to have been made by the party, is to be treated as equivalent to his written name. The mark may be proved by a witness who had seen the party make previous similar marks.⁵ But there must be some proof *aliunde* to identify the party charged with the mark.⁶

3. When, however, a third party so making a mark is shown to be capable of writing, then the presumption is that the mark was not intended to bind him, but was put on the paper acciden-

¹ L. 22, § 2 ; C. vi. 30.

² Nov. 73, cap. 8.

³ See Spangenburg, von Urkundenbeweis, i. 238.

⁴ So, *Zacharie v. Franklin*, 12 Pet. 151 ; *McDermott v. McCormick*, 4 Harr. (Del.) 543 ; *Bussey v. Whitaker*, 2 Nott & McC. 374.

⁵ *George v. Surrey*, M. & M. 516 ; *Strong v. Brewer*, 17 Ala. 706.

⁶ *Whitelocke v. Musgrove*, 1 C. & M. 511 ; 3 Tyr. 541 ; *Hays v. Hays*, 6 Penn. St. 368 ; *Ballinger v. Davis*, 29 Iowa, 512. See *George v. Surrey*, 1 M. & M. 516 ; *Savage v. Hutchinson*, cited *infra*, § 700.

tally or as an intentionally incomplete sign. No party, however, can set up such a defence, against those who accepted his mark on the faith that it bound him, he giving such grounds as would impose upon a good business man. And it is always open to the party relying on such mark to show that it was made intelligently and intentionally, for the purpose of expressing formal assent to the document so subscribed.¹

4. An attesting witness's mark is to be verified as is the mark of a party.² But in case of such attestation, the signature of the party himself ought, for greater safety, also to be proved.³

§ 697. Under the federal statutes of 1864 and 1866,⁴ providing that instruments without stamps should not be received in evidence, the question frequently arose whether stamps were necessary prerequisites to the reception of instruments in state courts. As to this question, it is now necessary only to say, that if the statutes in this respect controlled the state courts, then there would be no other department of state, or local law, whether as to principle or practice, which Congress, at least by subjecting litigation of the particular point to a tax, would not in like manner be able to control. To admit the constitutional right of Congress, therefore, to attach limitations to the reception of evidence in the state courts, would be to admit the right of Congress to control the materials on which the decisions of the courts of particular states should be based. That the limitation in question was not within the power of Congress was ruled by a series of state courts.⁵ In other juris-

Stamps
when nec-
essary
must be
attached.

¹ See Weiske, *Rechtslexicon*, xi. 673-4.

² *George v. Surrey*, 1 M. & M. 516. See *Watts v. Kilburn*, 7 Ga. 356.

³ *Ibid.*; *Gilliam v. Perkinson*, 4 Rand. 325. *Infra*, § 727.

In an equity case in England, where it was sought to prove a debt due by a deceased person to one W. P., and to prevent the debt from being barred by the statute of limitations, receipts for interest were produced in the handwriting of the deceased, and signed with the christian and surname of W. P., having a cross between them; and an affidavit was produced that P. was a

marksman, and that the signs or marks on those documents were respectively the mark or sign of W. P., used by him in place of signing his name; *Shadwell, V. C.*, thought the proof of the signature sufficient. *Pearcy v. Dicker*, 13 Jur. 997. See, also, *Baker v. Denning*, 8 A. & E. 94; *In the Goods of Bryce*, 2 Curt. 325.

⁴ See, for statutes imposing tax, U. S. Rev. Stat. §§ 3421-2; for repealing statute, 17 Stat. at Large, 256.

⁵ *Carpenter v. Snelling*, 97 Mass. 452; *Green v. Holway*, 101 Mass. 243; *Moore v. Quirk*, 105 Mass. 49; *Griffin v. Ranney*, 35 Conn. 239; *People*

dictions, however, this limitation of the scope of the statutes has been denied, though on reasoning which it is difficult to reconcile with the tenor of authorities in this branch of private international law, or with the sovereignty conceded by the federal Constitution to the states in all matters of process and evidence.¹ A stamp act has no force, on the principles of international law, unless imposed by the local sovereign ;² and to concede sovereignty to the federal government as to the evidential rules of state courts is to surrender state sovereignty in one of its prime functions.

§ 698. Even where the statutes were held to apply, it was, in several instances, determined that if there was no intent to defraud, the document was admissible.³ So, both in England and in this country, it is settled that the stamp acts apply only to documents which are introduced as the basis of an action, and not to those which are introduced for other purposes.⁴

v. Gates, 43 N. Y. 40; *Moore v. Moore*, 47 N. Y. 467; *Hale v. Wilkinson*, 21 Grat. 75; *Wallace v. Cravens*, 34 Ind. 534; *Craig v. Dimock*, 47 Ill. 308; *Wilson v. McKenna*, 52 Ill. 43; *Clemens v. Conrad*, 19 Mich. 170; *Sammons v. Halloway*, 21 Mich. 162; *Sporrer v. Eifler*, 1 Heisk. 633; *Whigham v. Pickett*, 43 Ala. 140 (but see *Mobile R. R. v. Edwards*, 46 Ala. 267); *Bumpass v. Taggart*, 26 Ark. 398; *Daily v. Coken*, 33 Tex. 815; *Jacobs v. Spofford*, 34 Tex. 152; *Duffy v. Hobson*, 40 Cal. 240.

¹ *Chartiers v. McNamara*, 72 Penn. St. 278; *Hugus v. Strickler*, 19 Iowa, 413; *Byington v. Oaks*, 32 Iowa, 488. See *Patterson v. Gile*, 1 Col. T. 200; *Hoops v. Atkins*, 41 Ga. 109; *Humphreys v. Wilson*, 43 Miss. 328. See, however, *Davis v. Richardson*, 45 Miss. 499; *Corrie v. Billiu*, 23 La. An. 250.

In the supreme court of the United States, the point was presented in October term, 1873, after the death of Chief Justice Chase and before his successor was appointed, and the eight associate justices were equally divided

in opinion, so the matter is still left open for determination in the ultimate tribunal. Note by the Reporter. *Emery v. Hobson*, 63 Me. 33.

² *Whart. Confl. of Laws*, § 693; *Fant v. Miller*, 17 Grat. 47; *Skinner v. Tinker*, 34 Barb. 333. See *infra*, § 780.

³ *Emery v. Hobson*, 63 Me. 33; *Baker v. Baker*, 6 Lansing, 509; *Corry Bank v. Rouse*, 3 Pittsb. 18; *Ricord v. Jones*, 33 Iowa, 26; *Timp v. Dockham*, 29 Wise. 440; *State v. Hill*, 30 Wise. 416; *Whitehill v. Skickle*, 43 Mo. 537. "To the admission of this instrument in evidence the defendant seasonably objected, upon the ground that it was not stamped as required by the acts of Congress of the United States. The plaintiff testified that the omission to stamp was with no intent upon his part to defraud the revenue, nor with any other fraudulent intent on his part. The instrument was properly admitted." *Emery v. Hobson*, 63 Me. 33.

⁴ *Mathewson v. Ross*, 2 H. of Lds. 286; *Atkins v. Plympton*, 44 Vt. 21; *Moore v. Moore*, 47 N. Y. 468; *Hell-*

So as proving the admission of a party, a document need not be stamped.¹

§ 699. Again, where a stamp is deemed essential, it is conceded that it is enough if it be placed on the document at any time before it is offered in evidence.² Nor is it necessary, so it has been ruled, that the stamps should be cancelled, as required by the revenue laws, by the initials of the maker of the instrument.³ So in Pennsylvania, where the authority of the stamp acts in general is yielded, it is held that a lost instrument can be proved by secondary evidence without showing that it was stamped.⁴ In Mississippi, where it has been held that a document is unavailable for want of a stamp, the plaintiff can recover on the common counts for goods sold or money lent.⁵ It has also been ruled in Pennsylvania that the omission of a stamp cannot be used to indicate want of consideration.⁶

§ 700. Since documents executed in foreign lands are to be presumed to have been rightly attested until the contrary be shown,⁷ the burden of showing such contrary is on the defence. No doubt, when an ordinary contract is sued on, such proof as the *lex fori* requires will be *primâ facie* sufficient to enable the contract to be put in evidence; the law being that the foreign law, with homogeneous jurisprudences, is presumed, until the contrary be shown, to be the same with the domestic.⁸ "If, therefore, a question arises before the tribunal of one state, in which an instrument written in

man *v.* Reis, 1 Cincin. 30; Reis *v.* Hellman, 25 Oh. St. 180. See *infra*, §§ 1082, 1124.

¹ 2 Phil. Ev. 3d ed. 397; 3 Parsons on Cont. 295; Mathewson *v.* Ross, 2 H. of Lords, 286; Cook *v.* Shearman, 103 Mass. 21; Moore *v.* Moore, 47 N. Y. 468; Long *v.* Spencer, 78 Penn. St. 303; Reis *v.* Hellman, 25 Oh. St. 180. *Infra*, § 1124.

² Edeck *v.* Ranuer, 2 Johns. 423; Foster *v.* Holley, 49 Ala. 593; Frazer *v.* Robinson, 42 Miss. 121; Morris *v.* McMorris, 44 Miss. 441; Waterbury *v.* McMillan, 46 Miss. 635; Vaughan *v.* O'Brien, 39 How. (N. Y.) Pr. 515; Long *v.* Spencer, 78 Penn. St. 303;

Logan *v.* Dils, 4 W. Va. 397; Alter *v.* McDougal, 26 La. An. 245. See, however, Whigham *v.* Pickett, 43 Ala. 140.

³ D'Armond *v.* Dubose, 22 La. An. 131; Schultz *v.* Herndon, 32 Tex. 390; Jacobs *v.* Cunningham, 32 Tex. 774.

⁴ Rees *v.* Jackson, 64 Penn. St. 486.

⁵ Humphreys *v.* Wilson, 43 Miss. 328.

⁶ Long *v.* Spencer, 78 Penn. St. 303.

⁷ *Infra*, § 1313.

⁸ See *supra*, § 314.

another state is produced in evidence, it is never rejected because such a kind of evidence is inadmissible, though the external form of the instrument, and the solemnities relating to it, may be made the subject of examination. But before this examination can be instituted, or the written instrument be received in evidence, a burden lies on the party producing it to show that the instrument has been executed, or is in conformity with the law of the place in which it was written. By what means this burden of proof shall be discharged is a question for the *lex fori* to decide.”¹ In other words, the *judex fori* is to determine, by the *lex fori*, whether the instrument was duly executed according to the law of the place of execution. In our own practice, the *judex fori*, when the foreign jurisprudence is homogeneous with the domestic, may presume identity, so far as to dispense with specific proof of the foreign law. But when the two jurisprudences are not homogeneous, then the foreign jurisprudence must be distinctively proved.²

“When the place of execution,” says Sir R. Phillimore,³ “is once determined, the law of that place ought to govern both the question of the external formalities, and the question of the authenticity of the act or instrument: *Il est du droit des gens que ce qui est authentique dans un pays le soit chez toutes les nations.*”⁴ In accordance with the principle which has been stated, an English court has holden, that an erasure in a foreign affidavit in the recital of a death, the certificate of which was proved as an exhibit, was immaterial, notwithstanding the notary, before whom the affidavit was sworn, had not affixed his initials to the erasure; and, in a case in which it was proved that the practice of verifying the mark of a marksman in an affidavit sworn abroad did not require, as in this country, the notary to insert in the jurat that the ‘witness saw the deponent make his mark,’ it was holden that the omission of these words was immaterial.”⁵

Savigny, whose authority in this respect is in Germany deserv-

¹ Phillimore Int. L. iv. 654. See, also, P. Voet, x. § 8; Bouhier, ch. xxi. Nos. 205, 206; Hertius, iv. 67; Mittermaier, Im. Archiv. f. d. Civil Praxis, 13, p. 300; Walter, D. Privatr. § 44; Bar, § 123; Story Confl. of L. §§ 352, 565.

² Supra, § 314 *et seq.*

³ Phill. Int. Law, iv. 659.

⁴ Fœlix, § 226.

⁵ Ibid., citing *Savage v. Hutchinson*,

3 Eq. Rep. (1853) 368; S. C. 24 L. J. Ch. 232.

edly high, holds that merchants' book accounts are to be judged by the law of the place where they are kept, as being inseparably connected with the juridical act itself. The foreigner, he also argues, who deals with a merchant, in a place where merchants' books are received as proof of a sale, subjects himself to the local law.¹ Nor is this position without great strength; for, in selling goods, the vendor views the security given as part of the contract, and this security his books are. If the vendee objects to them, he should do so at the time, so that some other security should be substituted. So has it been judicially decided by the court of appeals at Cassel.² On the other hand, when the method of proving such books comes up, the questions whether the vendor's own oath is enough, whether the book was kept with business accuracy, and whether the entries were made with sufficient freshness, seem clearly matters of process, to be determined by the *lex fori*.

Judge Story touches this point, but leaves it open. "Suppose," he says, "that the books of accounts of merchants, which (as is well known) are by the laws of some states admissible, and by those of other states inadmissible, as evidence, are offered in the forum of the latter to establish debts contracted in the former; ought they to be rejected?"³ And he speaks, in a note, of the opposite opinions expressed on this point by the old jurists, apparently, however, inclining to the view of Paul Voet, that such accounts are *prima facie* proof. Sir R. Phillimore adopts Savigny's views on this point without dissent or qualification.⁴

§ 701. It does not follow that because a document is signed A. B., a particular A. B., who is sued, is the signer of the document. Even supposing the name attached to the document to be genuine and not assumed, there may be several persons of the same name, and the person sued may not be the person who signed. Hence in such case there must be some kind of identification of the signer.⁵ Thus where a note was signed Hugh Jones, at Anglesea, England, and it appeared in evidence that there were several persons of the name of Hugh Jones at Anglesea; a plaintiff, who sued a

Distinctive
view as to
merchants'
book ac-
counts.

Identity of
alleged
signer of
document
must be
proved.

¹ Savigny, Röm. Recht, viii. § 381.

⁴ Phill. iv. 658.

² Ibid.

⁵ See *infra*, § 739 a.

³ Confl. of Laws, § 635, n.

particular Hugh Jones on the note, without any evidence to identify the defendant as the particular Hugh Jones, who signed the note, was nonsuited.¹ But where the name is uncommon,² or where there is, to adopt the language of Parke, B., in another case, "similarity of name and residence, or similarity of name and trade,"³ then there is enough to throw the burden of disproving identity on the defendant.⁴ And it is now held that unless the defendant's signature is by a mark,⁵ or unless there be evidence, as in a case above cited, of a name being common in a country, or unless there be some other circumstance calculated to throw confusion on identity, mere identity of name is sufficient for a *primâ facie* case.⁶ But some proof of identity there must be, though such proof be the mere similarity of name just noted.⁷

¹ Jones v. Jones, 9 M. & W. 75. See, also, Louden v. Walpole, 1 Ind. 319.

² Greenshields v. Crawford, 9 M. & W. 314; and see other cases cited *infra*, § 1273.

³ Smith v. Henderson, 9 M. & W. 801. See, also, Russell v. Smyth, 9 M. & W. 818; Mooers v. Bunker, 29 N. H. 420; Kinney v. Flynn, 2 R. I. 319. See Moss v. Anderson, 7 Mo. 337; and cases cited *infra*, § 1273.

⁴ Hamsler v. Kline, 57 Penn. St. 397; Russell v. Tunno, 11 Rich. (S. C.) 303; Moss v. Anderson, 7 Mo. 337. *Infra*, §§ 739 a, 1273.

⁵ Whitelocke v. Musgrove, 1 C. & M. 511; 3 Tyr. 541.

⁶ *Infra*, § 1273. Sewell v. Evans, 4 Q. B. 626; 3 G. & D. 604. See Murietta v. Wolfhagen, 2 C. & K. 744.

⁷ See *infra*, § 739 a.

In Taylor's Evidence, § 1657, we have the following remarks on the point of identity: "It may, however, here be observed that the description in the declaration cannot properly be said to prove the identity of the defendant. The question is, who was served with the writ, and who has pleaded to the action? and it is obvious that no description, which the plaintiff chooses to introduce into his

statement of his own case, can in strictness answer this question, or affect the defendant's interests. This remark is made, because in the case of Greenshields v. Crawford, 9 M. & W. 314, the court appears to have acted upon a similar mistake. The decision in Smith v. Henderson, 9 M. & W. 818, was right, not because the defendant was described by the plaintiff as a pilot, but because the accident was proved to have been caused by a pilot named Henderson, and a person answering that name and description was *present in court*, and might fairly be presumed to be the same Mr. Henderson who had pleaded to the action. In another case, in which a witness, called to prove the defendant's handwriting, had corresponded with a person bearing his name, who dated his letters from Plymouth Dock, where the defendant resided, and where it appeared that no other person of the same name lived, the evidence of identity was held to be sufficient; Harrington v. Fry, Ry. & M. 90, per Best, C. J.; and in Warren v. Sir J. C. Anderson, Bart., 8 Scott, 384, where the only proof of the defendant's signature to a bill was given by a clerk of Messrs.

Document by agent cannot be proved without proving power of agent.

§ 702. As we have already incidentally noticed, until a power is shown in an agent to execute a deed, or other document, such document cannot be put in evidence. Authority from the principal to the agent must be shown as a condition precedent to the agent's act being proved.¹ By the practice of most jurisdictions, however, when a suit is brought on a note signed by an alleged agent, the plaintiff is not obliged to prove the authority of the agent, unless it is denied under oath by the defendant.²

Documents over thirty years old prove themselves.

§ 703. It is noticed in another section that the handwriting of attesting witnesses, after the lapse of thirty years, need not be proved.³ The same rule is applied as to documents unattested by witnesses, and which are taken from proper depositaries.⁴ Thus in a leading English

Coutts, who stated that two years before the trial he saw a person, whom he did not know, but who called himself Sir J. C. Anderson, Bart., sign his name; that he had since seen checks similarly signed pass through the banking house, and that he thought the handwriting was the same on the bill; the court held that the evidence, weak as it confessedly was, might be submitted for the consideration of the jury.

¹ *Horsley v. Rush*, 7 T. R. 209; *Sanderson v. Bell*, 2 C. & M. 313; *Nicholson v. Patton*, 2 Cranch C. C. 164; *James v. Gordon*, 1 Wash. C. C. 333; *Atkinson v. St. Croix*, 24 Me. 171; *Trull v. True*, 33 Me. 367; *Emerson v. Providence Co.* 12 Mass. 237; *Lamb v. Irwin*, 69 Penn. St. 436; *Mech. Bk. v. Nat. Bk.* 36 Md. 5; *Yarborough v. Beard*, 1 Tayl. N. C. 25; *Wahrendorff v. Whittaker*, 1 Mo. 205; *Elliott v. Pearce*, 20 Ark. 508; *Carnall v. Duvall*, 22 Ark. 136; *Hughes v. Ho liday*, 3 G. Greene, 30; *Lowry v. Harris*, 12 Minn. 255; *Gashwiler v. Willis*, 33 Cal. 11; *Wharton on Agency*, § 48 *et seq.*

² *Bowen v. De Lattre*, 6 Whart. R. 430; *Delahay v. Clement*, 3 Ill. 575;

Thompson v. Abbott, 11 Iowa, 193; *Brashear v. Martin*, 25 Tex. 202.

³ See *supra*, §§ 194-5; *infra*, § 733.

⁴ *Doe v. Rawlings*, 7 East, 279; *Doe v. Sampton*, 8 Ad. & El. 154; *Evans v. Rees*, 10 Ad. & El. 154; *Doe v. Phillips*, 8 Q. B. 158; *Goodwin v. Jack*, 62 Me. 414; *Willeys v. Mondebaun*, 28 Mich. 521; *Johnson v. Shaw*, 41 Tex. 428. See fully cases cited *supra*, §§ 194-9, and *infra*, § 732.

“ Courts have felt obliged from necessity to depart from the strict rules of evidence in the admissions of ancient writings, documents, books, and records, to prove the existence of the facts they recite. The rule of evidence requiring the testimony of the lawful custodian of books of record offered in evidence, that they are of the description claimed, before they are admissible, has repeatedly been relaxed in the case of ancient books of record of proprietors of land. In such instances, such books have been held to prove themselves. When ancient books, purporting to be the records of such proprietary, contain obvious internal evidence of their own verity, and there is no evidence of the pres-

case,¹ a paper was received which purported to be a statement by a confidential agent to a former tenant for life, of rent reserved in 1728, and as such had been indorsed by the latter. This was held to be evidence, in 1806, of the fact, for the plaintiff, a tenant in tail, to whom it had been handed down with other muniments of title, to show that the rent reserved by a tenant for life, who had immediately preceded the plaintiff, was less than the rent originally reserved. "Ancient deeds," said Lord Ellenborough, "proved to have been found amongst deeds and evidences of land, may be given in evidence, although the execution of them cannot be proved; and the reason given is, 'that it is hard to prove ancient things, and the finding them in such a place is a presumption they were fairly and honestly obtained, and reserved for use, and are free from suspicion of dishonesty.' This paper, therefore, having been found amongst the muniments of the family accredited and preserved we think that it was evidence to be left to the jury of the amount of the ancient rent at the time it bears date."² So in a subsequent authoritative ruling,³ Tindal, C. J., said: "The result of the evidence, upon the bill of exceptions, we think

ent existence of the proprietary or of any person representing it, or any clerk or other person authorized to keep the records, they are admissible in evidence without proof of the legal organization of the proprietary, or of its subsequent meetings." Goodwin v. Jack, 62 Me. 416, Dickerson, J.

The Roman law recognized no presumption of law in favor of the genuineness of documents, however ancient or well guarded. The jurist was to inspect such documents with the same eye as did the historian. They might be ancient, and they might have been well guarded; but they might on their face contradict other monuments of unquestionable accuracy and genuineness; they might on their face bear plain marks of falsification. That they were old did not tell in their favor, unless it could be shown that the marks of age were not

forged, or that there were proofs which would connect the preparation of the documents with a specific era; that they were well guarded was no proof, unless the guardians were called as witnesses, or unless it should appear that the guardians were not only vigilant but faithful. It was therefore held that the law would interpose no arbitrary presumption in favor of the genuineness of such instruments, and it was required that persons offering such instruments should give at least *prima facie* proof of genuineness. The question was one of fact, open to all the presumptions of fact which a sound and free logic would in such cases apply. See Endemann's Beweislehre, 258.

¹ Roe v. Rawlings, 7 East, 279.

² Powell's Evidence, 4th ed. 167.

³ Bishop of Meath v. Marquis of Winchester, 3 Bing. (N. C.) 183.

is this: that these documents were found in a place in which, and under the care of persons with whom, papers of Bishop Dopping might naturally and reasonably be expected to be found, and that is precisely the custody which gives authenticity to documents found within it; for it is not necessary that they should be found in the best and most proper place of deposit.”¹ It should

¹ “If documents,” so the argument continues, “continued in such custody, there never would be any question as to their authenticity; but it is when documents are found in other than the proper place of deposit that the investigation commences, whether it was reasonable and natural, under the circumstances in the particular case, to expect they should have been in the place where they were actually found; for it is obvious that whilst there can be only one place of deposit strictly and absolutely proper, there may be various and many that are reasonable and probable, though differing in degree; some being more so, some less; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently genuine to render a document admissible, appears from all the cases. On the one hand, old grants to abbeys have been rejected as evidence of private rights, where the possession of them has appeared altogether unconnected with the persons who had any interest in the estate. Thus, a manuscript found in the Heralds’ office, enumerating the possessions of the dissolved monastery of Tutbury, a manuscript found in the Bodleian Library, Oxford, and a grant to a priory brought from the Cottonian MSS. in the British Museum, were

all held to be inadmissible, the possession of the documents being unconnected with the interests in the property. On the other hand, an old chartulary of the dissolved abbey of Glastonbury was held to be admissible, because found in the possession of the owner of part of the abbey lands, though not of the principal proprietor. This was not the proper custody, which, as Lord Redesdale observed, would have been the Augmentation Office; and, as between the different proprietors of the abbey lands, it might have been more reasonably expected to have been deposited with the largest; but it was, as the court argued, a place of custody where it might be reasonably expected to be found. So, also, in the case of *Jones v. Waller*, the collector’s book would have been as well authenticated if produced from the custody of the executor of the incumbent or his successor, as from the hands of the successor of the collector. Upon this principle, we think the case stated for the opinion of counsel, purporting to be stated on the part of Bishop Dopping, and found in the place and in the custody before described, was admissible in evidence. It was a document which related to the private interests of the bishop, at the time it was stated, for it bears date in 1695, about which time, it appears from other facts found, that Barry, the late incumbent, was dead, and that before 1697, Bishop Dopping collated his own son. It related, therefore, to a real transaction which took place at the time; and although it might be

be remembered at the same time that while a particular link in a title can be thus proved, it is necessary to connect such link with the prior title. A deed from an administrator, the deed being thirty years old, may be put in evidence, if taken from the proper depositary, without proving signature, but not without proving some title in the administrator to sell.¹

§ 704. Where, for the purposes of verification, it is important to go back beyond thirty years, a person who is familiar (from having had occasion to examine old deeds and other papers indisputably traceable to the party whose signature is contested) with the handwriting in question may be permitted to testify as to the genuineness of a document.² Thus when, in the Fitzwalter Peerage case,³ it was material to determine whether a family pedigree, produced from the proper custody, and purporting to have been made some ninety years before by an ancestor of the claimant, was written by him, and when the family solicitor was called, and it was shown that he had acquired a knowledge of the ancestor's writing,

Such documents may be verified by experts

said to have related in some degree to the see, for the right of collation was claimed, as of an advowson granted to the see; yet it is manifest this case had been stated with reference to the private interests of the bishop in the particular avoidance, and that it was more reasonable to expect it to be preserved with his private papers, and family documents, than in the public registry of the diocese. But even considered as a document belonging to the see, it was not unreasonable that it should have been found in the bishop's mansion-house; for, upon the evidence, there is only one single ecclesiastical record preserved in the registry of the diocese of Meath of an earlier date than 1717; and, on the other hand, the case and grant are found in the same parcel with several papers relating to the see of Meath, and in the same room were several visitation books of the diocese and other papers relating to the see."

"It appears from this case," comments Mr. Powell, "that it is not necessary that the custody should be that which is strictly proper; it is sufficient if it be one which may be reasonably and naturally explained; Doe v. Sampter, 8 Ad. & El. 154; and one which affords reasonable assurance of the authenticity of the document. Per Coleridge, J., Doe v. Phillips, 8 Q. B. 158. But it is not sufficient to produce the documents without calling a witness to prove the custody from which they come. Evans v. Rees, 10 Ad. & El. 154." Powell's Evidence, 4th ed. 169.

¹ Fell v. Young, 63 Ill. 106.

² Fitzwalter Peerage case, 10 Cl. & Fin. 193; Cantey v. Platt, 2 McCord (S. C.), 260; Jackson v. Brooks, 8 Wend. 426; Smith v. Rankin, 20 Ill. 14; Sweigart v. Richards, 8 Penn. St. 436.

³ Fitzwalter Peerage, 10 Cl. & Fin. 193. See Crawford & Lindsay Peerage, 2 H. of L. Cas. 556-58.

from having had occasion at different times to examine, in the course of his business, many deeds and other instruments purporting to have been written or signed by such ancestor, the court held this witness competent to prove the handwriting of the pedigree. Similar proof was admitted in a case¹ of pedigree, where the genuineness of a marriage certificate, eighty-five years old, was in issue, and where the court of queen's bench held that it was sufficient, in order to establish the signature of "W. Davies," the curate signing the certificate, to show by the parish clerk, that in the course of his official duty he had acquired a knowledge of the handwriting of Mr. Davies, from various signatures in the original register, and that the signature was genuine.²

§ 705. It has sometimes been said that the strongest testimony to be had to the genuineness of handwriting is that of the writer himself.³ This, however, is not necessarily the case. I may remember having written or signed a particular document, and this recollection, taken in connection with my recognition of my own signature, forms strong evidence. But it by no means follows that I am the person most able to distinguish my own writing from a skilful forgery. Those who are experts in respect to handwriting are able to observe delicate shades which may be imperceptible to me, and to apply tests of which I may be ignorant. So a rude penman may be unable to frame his signature in such a way as to present to him any positive differentia. At the same time, the belief of persons accustomed to use their pens with ordinary frequency, as to the genuineness of their signature, is entitled to great consideration; and it is one of the benefits of the late statutes making parties witnesses, that the

¹ Doe v. Davies, 10 Q. B. 314.

² In the Fitzwalter Peerage case, 10 Cl. & Fin. 193, the house of lords, qualifying in this respect earlier rulings (see Sparrow v. Tarrant, 2 St. Ev. 517, n. c, per Holroyd, J.; Doe v. Lyne, 2 Ph. Ev. 258, n. 1, per Ibid.; Beer v. Ward, cited Ibid. per Dallas, C. J., and Ld. Tenterden; Anon. per Ld. Hardwicke, cited B. N. P. 236,

b), held that expert testimony, not derived from business dealing with such documents, but from mere study, in view of the litigation, of the signatures, was inadmissible on the issue of genuineness. See, however, § 718, *contra*; Sweigart v. Richards, 8 Penn. St. 436; Bradt v. Brooks, 8 Wend. 426; S. C. 15 Wend. 112.

³ Taylor's Evidence, § 1660.

testimony of parties to their own signature can now be obtained by the ordinary common law processes.¹ Much less weight, however, belongs to the casual, extra-judicial admission of a person that a certain writing is his. To make such an admission receivable, it must appear that the writing was shown to him; and even then he may show that his admission was founded on mistake. But, in any view, such an admission is *primâ facie* evidence.² Authority in an agent to sign the principal's name may in like manner be proved by the principal's admission.³

§ 706. In England, by statute, a person whose handwriting is in dispute, may be called upon by the judge to write in his presence, and such writing may be compared with the writing in litigation.⁴ In this country similar statutes have been adopted. No doubt occasional advantages may flow from the application of this test.⁵ "At the Greenwich county court," so Mr. Taylor tells us,⁶ "a plaintiff denied most positively that a receipt produced was in his handwriting. It was thus worded: 'Received the Hole of the above.' On being asked to write a sentence in which the word 'whole' was introduced, he took evident pains to disguise his writing, but he adopted the above *phonetic* style of spelling, and also persisted in using the capital H. On being subsequently threatened with an indictment for perjury, he absconded." The practice

Party may be called upon to write.

¹ See *infra*, § 706.

² *Infra*, §§ 725, 1089-1095.

³ "Evidence was also given, against the defendant's exception, tending to prove that he had recognized the validity and his liability for the payment of other notes to which his name, in conjunction with that of his co-defendant (who was his son), purported to be signed, but which he himself had not signed, after full knowledge that the signature was not in his proper handwriting. This, within the principle of the decisions in *Weed v. Carpenter*, 4 Wend. 219; *Same v. Same*, 10 *Ibid.* 404, was admissible, in connection with the fact that his name was so signed by his co-defendant, or assumed so to have been, on the trial,

for the purpose of showing that he had authorized it to be done, from which the jury might infer or presume an implied authority to sign his name to the note in question, if as the judge at the circuit instructed the jury, he 'was in the *habit* of recognizing these notes which his son thus signed in his name as authorized and genuine notes.' See, also, *Cunningham v. Hudson River Bank*, 21 Wendell, 559." Lott, Ch. C., *Hammond v. Varran*, 54 N. Y. 400.

⁴ See *Devine v. Wilson*, 10 Moo. P. C. R. 502; *Cobbett v. Kilminster*, 4 F. & F. 490.

⁵ See *Chandler v. Le Barron*, 45 Me. 534.

⁶ *Taylor's Evidence*, § 1669.

of thus testing a party is vindicated by one of the most sagacious of German jurists, Mittermaier, on grounds not only of expediency, but of authority.¹ To the weight of such evidence, however, rather than to its admissibility, it may be objected that a person who is called upon to write, in a court-house, a piece for judicial inspection, may have strong motives to modify his usual style of writing, and in any view, such writing would be likely to be more formal and regular than a current business hand, and to perplex rather than convince experts. Nor should it be forgotten that nervousness, at such a moment, might, especially with women, subdue in the writing its usual characteristics. At the same time, on cross-examination of a witness who has denied his signature, such a practice is proper and efficient.² But it is clear that a party should not, on the other hand, be permitted to manufacture evidence for himself by writing his name as a basis for a comparison of hands by a jury.³ It should be observed that evidence of handwriting by another is in no sense secondary to evidence of such handwriting by the writer himself.⁴

§ 707. The most direct way in which one man can become acquainted with the handwriting of another is by seeing such other person write. Yet we must not be led away by the apparent closeness of connection that is thus involved. I may see a person write several times without becoming by any means as familiar with his handwriting as I would be by maintaining with him a protracted correspondence. I may watch him but listlessly, or at a distance, as one clerk may do another in a counting-room, without mastering the peculiarities of his penmanship. Still, with

Seeing a person write qualifies a witness to speak as to his writing.

¹ See Nov. 73, cap. i.

² "There are cases to the effect that, where a witness has denied his signature to a document, he may be called upon, in cross-examination, to write his name in open court, in order that the jury may compare such writing with the controverted signature; but this is merely as a part of the cross-examination, and for the purpose of contradicting the witness. *Doe v. Wilson*, 10 Moore P. C. 502, 530;

Chandler v. Le Barron, 45 Me. 534; *Taylor on Evidence*, § 1669." Ames, J., *King v. Donahue*, 110 Mass. 155.

³ *King v. Donahue*, 110 Mass. 155; but see *Roe v. Roe*, 40 N. Y. Sup. Ct. 1.

⁴ *R. v. Hazy*, 2 C. & P. 458; *R. v. Hurley*, 2 M. & Rob. 473; *R. v. Benson*, 2 Camp. 508; *Smith v. Prescott*, 17 Me. 277; *Ainsworth v. Greenlee*, 1 Hawks, 190; *McCaskle v. Amarine*, 12 Ala. 17. *Supra*, § 394.

all these qualifications, the "presumption *ex visu scriptiois*," as Mr. Bentham calls it,¹ not only lends to such testimony much weight, but makes it technically primary.² It has, however, been said that such knowledge of handwriting, in cases where forgery is charged, must be before the commencement of the suit; for it is argued that after a suit involving forgery has been instituted, a party is under too great a temptation to make evidence for himself to justify dependence on his samples of his penmanship. But this reasoning, as giving an absolute rule as to time, cannot now prevail in those states in which by statute interest is for the jury and not for the

¹ Jud. Evid. iii. 598.

² *R. v. Tooke*, 25 How. St. Tr. 71; *Garrels v. Alexander*, 4 Esp. 37; *Eagleton v. Kingston*, 8 Ves. 473; *Lewis v. Sapio*, M. & M. 39; *Doe v. Sucker*, 5 A. & E. 730; *George v. Surrey*, M. & M. 516 (a case of a mark); *U. S. v. Prout*, 4 Cranch C. C. 301; *Hopkins v. Meguire*, 35 Me. 78; *Rideout v. Newton*, 17 N. H. 71; *Hoitt v. Moulton*, 21 N. H. 586; *Bowman v. Sanborn*, 25 N. H. 87; *Keith v. Lothrop*, 10 Cush. 453; *Magee v. Osborn*, 32 N. Y. 669; *Hammond v. Varian*, 54 N. Y. 398; *Hartung v. People*, 4 Park. C. R. 319; *Com. v. Smith*, 6 Serg. & R. 568; *Edelen v. Gough*, 8 Gill, 87; *Smith v. Walton*, 8 Gill, 77; *Pepper v. Barnett*, 22 Grat. 405 (where the witness only saw the party write once); *State v. Hess*, 5 Ohio, 7; *Woodford v. McClenahan*, 4 Gilman, 85; *Board v. Misenheimer*, 78 Ill. 22; *Commis. v. Hanion*, 1 Nott & McC. 554; *State v. Stalmaker*, 2 Brev. 1; *State v. Anderson*, 2 Bailey, 565; *Strong v. Brewer*, 17 Ala. 706 (case of a mark).

As to familiarity with ancient signatures, see supra, § 704.

"Abstractedly considered," says Mr. Best, "it is clear that a judgment respecting the genuineness of handwriting, based on its resemblance to,

or dissimilarity from, that of the supposed writer, may be formed by one or more of the following means: 1st, A standard of the general nature of the handwriting of the person may be formed in the mind, by having on former occasions observed the characters traced by him while in the act of writing, with which standard the handwriting in the disputed document may, by a mental operation, be compared. 2dly, A person who has never seen the supposed writer of the document write may obtain a like standard, by means either of having carried on written correspondence with him, or having had other opportunities of observing writing which there was reasonable ground for presuming to be his. 3dly, A judgment as to the genuineness of the handwriting to a document may be formed, by a comparison instituted between it and other documents known or admitted to be in the handwriting of the party. These three modes of proof, — the admissibility and weight of which we propose to consider in their order, — have been accurately designated, respectively: 'Praesumptio ex visu scriptiois;' 'Praesumptio ex scriptis olim visis;' and 'Praesumptio ex comparatione scriptorum,' or 'ex scripto nunc viso.' 3 Benth. Jud. Ev. 598, 599."

court, and parties are admitted to testify on their own behalf. Nor, on principle, can it be admitted as an inflexible test that evidence which a party has the opportunity of moulding in his own interests is to be ruled out. If all such evidence is to be excluded, comparatively little evidence could be let in.¹ At the same time, as has been well observed,² the knowledge must not have been acquired or communicated with a view to the specific occasion on which the proof is offered.³ Thus in a case involving the genuineness of the defendant's signature to a note, Lord Kenyon rejected the evidence of a witness who stated that he had seen the defendant write his name several times before the trial, he having written it for the purpose of showing to the witness his true manner of writing it, that the witness might be able to distinguish it from the pretended acceptance to the bill; and the reason given was, that the defendant might through design have written differently from his common mode of writing his name.⁴ So where, on an indictment for sending a threatening letter, the only witness called to prove that the letter was in the handwriting of the accused was a policeman, who, after the letter had been received and suspicions aroused, was sent by his inspector to the accused to pay him some money and procure a receipt, in order thus to obtain a knowledge of his handwriting by seeing him write; his evidence was rejected, by Maule, J., on the ground, that "Knowledge obtained for such a specific purpose and under such a bias is not such as to make a man admissible as a *quasi expert* witness."⁵

§ 708. Seeing another person write, therefore, though technically the most direct way of becoming familiar with his handwriting, is not so generally reliable as the acquaintance which one man, himself experienced in penmanship, acquires from a familiarity with another's writings. This familiarity may be based upon an interchange of correspondence with such other person. It may be

Witness familiar with another's handwriting may prove it.

¹ See *Reid v. State*, 20 Ga. 681.

² Best's Ev. § 236.

³ See the judgments of Patteson and Coleridge, JJ., in *Doe d. Mudd v. Suckermore*, 5 A. & El. 703; S. P.,

Keith v. Lothrop, 10 Cush. 453; and infra, § 715. See, also, *Doe v. Newton*, 5 Ad. & El. 514.

⁴ *Stanger v. Searle*, 1 Esp. 14.

⁵ *R. v. Crouch*, 4 Cox C. C. 163.

based, as is that of a bank teller, upon the payment of checks. It may be based upon any ordinary business transactions in which writings are used.¹ It may be utterly severed from any proof that the witness ever saw the party write. It is sufficient to admit such evidence that there is an acknowledgment, express or implied, by the party writing, of the writings from which the opinion of the witness is drawn.² If, for instance, W. writes to P., by the post, to P.'s usual address, and an answer, purporting to come from P., is received by W. by post, this, if the correspondence continues, raises a presumption that P.'s letter is genuine, and thus enables W. to take it as the basis of his opinion as to P.'s handwriting.³ A clerk or servant taking his master's letters to the post, or an agent consulted as to his principal's writings, is in like manner entitled to form an admissible opinion;⁴ and so of a business correspondent who has taken notes in the same writing to the alleged maker, who has paid the notes;⁵ and of a person whose official duty makes it incumbent on him to act frequently on the signature of the alleged writer.⁶ Persons familiar with the signature of the officers of the bank to bank notes, such notes being proved to be treated by the bank as good, may be permitted to prove such signatures.⁷

¹ See *supra*, § 704, as to such acquaintance with ancient writings.

² *Tharpe v. Gisburne*, 2 C. & P. 21; *Greaves v. Hunter*, 2 C. & P. 177; *Doe v. Suckermore*, 5 A. & E. 731; *S. C.* 2 N. & P. 46; *U. S. v. Keen*, 1 McLean, 429; *U. S. v. 3109 Cases of Champagne*, 1 Ben. 241; *Hammond's case*, 2 Greenl. 33; *Page v. Homans*, 14 Me. 478; *Burnham v. Ayer*, 36 N. H. 182; *Com. v. Peck*, 1 Mete. (Mass.) 428; *Lyon v. Lyman*, 9 Conn. 55; *Com. v. Carey*, 2 Pick. 47; *U. S. v. Simpson*, 3 Penn. 437; *State v. Spence*, 2 Harring. 348; *Turnipseed v. Hawkins*, 1 McCord, 272; *Gordon v. Price*, 10 Ired. L. 385; *Jones v. Huggins*, 1 Dev. L. 223; *Bruce v. Crews*, 39 Ga. 544.

³ *Carey v. Pitt*, Pea. Add. Cas. 130; *Gould v. Jones*, 1 W. Bl. 384; *State v. Shinborn*, 46 N. H. 497; *Chaffee v.*

Taylor, 3 Allen, 598; *Jackson v. Van Dusen*, 5 Johns. R. 144; *Johnson v. Daverne*, 19 Johns. 134; *Baker v. Squier*, 1 Hun, 448; *S. C.* 3 S. C. 465; *Com. v. Smith*, 6 S. & R. 568; *McKonkey v. Gaylord*, 1 Jones (N. C.) L. 94; *South. Ex. Co. v. Thornton*, 41 Miss. 216; *Reyburn v. Belotti*, 10 Mo. 597. See *Desbrow v. Farrow*, 3 Rich. (S. C.) 382; and see *infra*, § 1323.

⁴ *Doe v. Suckermore*, 5 Ad. & E. 740.

⁵ *Johnson v. Daverne*, 19 Johns. R. 134; *Donaghoe v. People*, 6 Parker C. R. 120; *Hess v. State*, 5 Ohio, 5.

⁶ *Amherst Bank v. Root*, 2 Mete. 522; *Willson v. Betts*, 4 Denio, 201; *Bank of the Com. v. Mudgett*, 41 N. Y. 514; *Sill v. Reese*, 47 Cal. 294.

⁷ *State v. Carr*, 5 N. H. 367; *Amherst Bank v. Root*, 2 Mete. (Mass.) 522; *State v. Stalmaker*, 2 Brevard,

It is scarcely necessary to add that the writings from which the witness draws his opinion must be identified as those of the party whose writing is contested on the trial.¹ It will not be enough that the witness obtains his knowledge from letters *said* to be genuine.² It may be added that this kind of testimony is not excluded, as has been already noticed, by the fact that the writer of the instrument is himself in court, and could be called.³

§ 709. A witness called to testify as to handwriting, and who
 Burden on opposite party to establishes a *prima facie* case of acquaintance with the handwriting of the person whose signature is in dispute

1; State v. Candler, 3 Hawks, 393; Allen v. State, 3 Humph. 367.

¹ Doe v. Snickmore, 5 A. & E. 731, by Patterson, J.; Cochran v. Butterfield, 18 N. H. 115; McKeone v. Barnes, 108 Mass. 344; Com. v. Coe, 115 Mass. 481; Cunningham v. Bank, 21 Wend. 557; Boyle v. Colman, 13 Barb. 42; Magie v. Osborn, 1 Robt. (N. Y.) 689.

We have this position pushed to a questionable extreme in an English case, in a suit on a joint and several promissory note against three persons. The signature of one of them was attempted to be proved by calling the attorney for the defendants, whose knowledge of the handwriting in question was founded on the circumstance, that he had received a retainer purporting to be signed by his three clients, and had acted upon it in defending the action. It was held by the court of common pleas that his testimony was inadmissible, as no proof was given that the party had ever acknowledged the signature of the attorney, and either of the other two defendants might have signed the retainer for him with his assent. Drew v. Prior, 5 M. & Gr. 264. So, the testimony of an inspector of franks, called to prove the handwriting of a member of parliament, has on two occasions been rejected, where the

knowledge of the witness was simply derived from his having frequently seen franks pass through the post-office, bearing the name of such member, but where he had never communicated with the member on the subject of franks; for, in this case, the superscriptions of the letters seen by the witness might possibly have been forgeries. Carey v. Pitt, Pea. Add. Cas. 130, per Ld. Kenyon; Batchelder v. Honeywood, 2 Esp. 714, per Ibid. These last decisions, it is well added by Mr. Taylor (Evidence, § 1664), certainly carry the law to the verge of impropriety, since they are founded on a presumption which not only is improbable in the highest degree, but is in direct contradiction to the sound rule, that a crime is not to be presumed, or so much as suspected, without special cause, in any single instance, much less in a number of unconnected instances. 3 Bent. Ev. 604.

² Nat. Un. Bk. v. Marsh, 46 Vt. 443; Goldsmith v. Bane, 3 Halst. 87; McKonkey v. Gaylord, 1 Jones L. (N. C.) 94. See R. v. Benson, 2 Camp. 508.

³ Smith v. Prescott, 17 Me. 277; Ainsworth v. Greenlee, 1 Hawks, 190; Pomeroy v. Golly, Ga. Dec. pt. i. 26; McCaskle v. Amarine, 12 Ala. 17. Supra, § 706.

has the presumption of competency in his favor.¹ If, however, the opposing party contest his qualifications, he may be cross-examined as to his reasons, so that these qualifications may be tested by the court.² It is not necessary that the witness should swear to an actual *belief* in the genuineness of a writing. It is enough if he states his *opinion* as to such genuineness.³ Lord Kenyon went so far as to hold that it was admissible for a witness to testify merely that the contested writing was like the handwriting of the party to whom it is charged ;⁴ and though this has been doubted by Lord Eldon,⁵ yet it is hard to say why the value of such testimony is not as much for the jury as for the court.⁶

§ 710. There is little question that a witness may, on cross-examination, be tested by putting to him other writings, not admitted in evidence in the case, and asking him whether such writings are in the same hand with that in litigation. The tendency, also, is to hold that the test writings, if declared by the witness to be genuine, may be shown by the cross-examining party to be not genuine, and may be given to the jury for comparison.⁷

On cross-examination witness may be tested by other writings.

But a witness, when called to testify as to his own writing, should have the whole paper before him in order to enable him to make up his judgment. Hence, on examination of a party as to whether a certain writing is his, he cannot be compelled to answer whether the signature is his, unless he is permitted to examine the paper to which it is appended.⁸

¹ Goodhue v. Bartlett, 5 McLean, Ev. 249, n. 2. As to cross-examination, see supra, §§ 531 *et seq.*
186 ; Moody v. Rowell, 17 Pick. 490 ;
Whittier v. Gould, 8 Watts, 485 ;
Barwick v. Wood, 3 Jones L. 306 ;
Henderson v. Bank, 11 Ala. 855.

² See Rogers v. Ritter, 12 Wall. 317 ; Slaymaker v. Wilson, 1 Penn. R. 216.

³ Watson v. Brewster, 1 Penn. St. 381 ; Shitler v. Bremer, 23 Penn. St. 413 ; Clark v. Freeman, 25 Penn. St. 133 ; Fash v. Blake, 38 Ill. 363 ; and see Utica Ins. Co. v. Badger, 3 Wend. 102. See supra, § 515.

⁴ Garrells v. Alexander, 4 Esp. 37 ; approved by Lord Wynford, see 2 Ph.

Ev. 249, n. 2. As to cross-examination, see supra, §§ 531 *et seq.*

⁵ Eagleton v. Kingston, 8 Ves. 476. See, also, Cruise v. Clancy, 8 Irish Eq. 552 ; Taylor v. Sutherland, 24 Penn. St. 333 ; Taylor's Ev. § 1666.

⁶ See Benth. Jud. Ev. iii. 599.

⁷ See Griffiths v. Ivory, 11 A. & E. 322 ; 3 P. & D. 179 ; Young v. Honner, 2 M. & Rob. 537.

⁸ North Am. Ins. Co. v. Throop, 22 Mich. 146.

"Where 'an expert,' said Cooley, J., 'is undertaking to testify concerning handwriting, it is difficult to set any bounds to an examination which

§ 711. By the Roman law, the genuineness of a contested writing may be sustained by witnesses comparing such writing with other writings acknowledged to be genuine. Some fluctuation of opinion, however, was exhibited as to the writings to be taken as a basis for such comparison.

By Roman law comparison of hands is permitted.

may reasonably tend to test the accuracy of his knowledge, skill, and judgment. Obviously it would be proper to subject him to tests which would be entirely improper and tend unjustly to embarrass and confuse one who did not assume to be an expert, but who might, nevertheless, have some personal knowledge of a particular specimen of handwriting submitted to his inspection. A person who cannot even read handwriting may, nevertheless, be able to testify to a particular signature which he has seen made; for particular marks upon the paper may identify, beyond question, the instrument whose execution he witnessed. But if such a witness were required to look at the signature separated from the instrument, and to say, without any of the aids which the marks upon the instrument would give him, whether that was or was not the signature he saw written, it is perceived at once that the requirement would be unfair, and a categorical answer impossible. Now it may be said that every man is an expert as regards his own handwriting, and may rightfully be subjected to the same tests, when he is called to testify concerning it, that other experts might be tried by; but, in fact, a large proportion of the people do not possess, or assume to possess, any such knowledge of the peculiarities of their own handwriting, if any such there are, distinguishing it from any other, as would justify their expressing the opinion whether isolated signatures, which might be theirs, were in truth so or not. The handwriting of a man who writes but

little may never acquire any very definite characteristics, or any great uniformity; and a very accurate penman may possibly copy the correct standard of penmanship so nearly as to render it difficult for him to determine whether a particular word shown to him was written by himself or by some other writer, who, with equal facility, has copied the same standard. All writing in the same language follows, in greater or less degree, the same models, and the same uniformity is always to be expected. If all houses were constructed in a like degree after one plan, it might be, nevertheless, possible for any house builder to recognize the several houses he had built, if he could see each with its surroundings; but to require him to take a view of one, with the surroundings excluded, and to say whether he constructed it or not, could hardly be fair to the witness, or a method likely to bring out the knowledge, if any, which he actually possessed. A man may recognize even a casual acquaintance if his whole person, size, height, carriage, and peculiarities of deportment may be observed, when, if he were compelled to judge by a single feature, or even by a view of the whole face, he might easily be deceived, in consequence of missing something upon which his recognition in part depended. Any examination, based upon such partial view, might be useful, if entrapping the witness were the purpose to be accomplished; but it could not be a reasonable mode of arriving at the truth. The witness in any such case is fairly entitled to

son.¹ It was first held that, in order to put a greater check on forgery, writings, to be thus accepted, must be either publicly registered, or should be attested by three witnesses.² Subsequently it was declared that for the same purpose might be used private papers acknowledged by the writer, or deposited by him in public archives.³ The substantial result, however, finally reached is, that to enable a writing to be adopted as a standard of comparison, it must be demonstrated to be genuine. It makes no matter what is the writing thus adopted. It may be, as Gensler remarks, a love-letter, or it may be a testament.⁴ If genuine, it may be received as a standard.

§ 712. By the English common law, it is said, such a comparison is inadmissible.⁵ The reasoning on which this conclusion rests is that, no doubt, which influenced the earlier Roman jurists. Handwriting, especially among those with whom writing is not a habit, often changes from period to period; a man not accustomed to write may write now very differently from the way he did five years ago. Cultivation, also, in handwriting, as well as in other arts, produces a variety of types, and the less cultivation, the greater is the sameness, and the less opportunity of distinguishing peculiarities. So, in a non-literary and non-commercial age, there are few whose business it is to study the distinctions of handwriting; in a commercial age this is a necessity, and calls for a distinct

Other-
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all the aids to recognition which the circumstances and surroundings afford; and we think the court very justly and properly required that he should have them in this case. This by no means precludes a careful and critical examination of the witness after the general question has been answered, with a view to testing the accuracy of the opinion expressed, and the grounds upon which it is based. A thorough sifting of the testimony of the witness is always admissible; but justice to him required that, before he is subjected to that process, he should be allowed to give his testimony in view of all the facts bearing upon the point under examination, so

far as they may be within his knowledge, instead of being restricted to a partial and imperfect view, by means of which the likelihood of error, mistake, and embarrassment may be greatly increased." Cooley, J., *The North American Fire Insurance Co. v. Throop*, 22 Michigan R. 161.

¹ Büchner, *De probatione de litterarum comparationem*.

² L. 20, c. iv. 21.

³ Nov. 49, cap. 2.

⁴ See Gensler in *Archiv.* ii. 330; Langenbeck, *Beweis.* ii. 653.

⁵ *Garrels v. Alexander*, 4 Esp. 37; *Bromage v. Rice*, 7 C. & P. 548; *Hughes v. Rogers*, 8 M. & W. 123.

profession. In the United States we have a series of authorities which rest on the older English rule, and hence, following this reasoning, exclude evidence of genuineness based on comparison of hands.¹

¹ In New York, *Jackson v. Phillips*, 9 Cow. 94; *Titford v. Knott*, 2 John. Ca. 210, now however, altered by statute. See *People v. Hewitt*, 2 Parker C. C. 20; *Bank of Penns. v. Haldeman*, 1 Penn. 161; *Slaymaker v. Wilson*, 1 Penn. 216; *Penn. R. R. v. Hickman*, 28 Penn. St. 318; *Niller v. Johnson*, 27 Md. 6; *Virginia, Rowt v. Kile*, 1 Leigh, 216; *Richardson v. Johnson*, 3 Brev. 51; *North Carolina, State v. Allen*, 1 Hawks, 6; *Pope v. Askew*, 1 Iredell, 16; *Illinois, Jumpertz v. People*, 21 Ill. 375; *Kernin v. Hill*, 37 Ill. 209; *Indiana, Chance v. R. R.* 32 Ind. 472; *Burdick v. Hunt*, 43 Ind. 381; overruling *Clark v. Wyatt*, 15 Ind. 271; in *Louisiana, State v. Fritz*, 23 La. An. 55. See, to same effect, *U. S. v. Craig*, 4 Wash. C. C. 729; *Shank v. Butsch*, 28 Ind. 19; *Woodard v. Spiller*, 1 Dana, 179; *Clark v. Rhodes*, 2 Heisk. 206; *State v. Givens*, 5 Ala. 747; *Bishop v. State*, 30 Ala. 34; *Hanley v. Gandy*, 28 Texas, 211; *Pierce v. Northey*, 14 Wisc. 9.

The rule of the English common law courts in this respect was opposed to that of the ecclesiastical courts, which admitted comparison of hands. 1 Will. on Ex. 309; 1 Ought. tit. 225, §§ 1-4; *Doe v. Suckermore*, 5 A. & E. 708-710, per Coleridge, J.; *Beaumont v. Perkins*, 1 Phillim. 78; *Supt. v. Atkinson*, 1 Add. 215, 216; *Maekin v. Grinslow*, 2 Cas. temp. Lee, 335; 2 Add. 91, n. a, S. C.

The act of parliament of 28 & 29 Vict. c. 18, enacts, in section eight, "that comparison of a disputed writing with any writing proved to the satisfaction of the judge to be gen-

uine, shall be permitted to be made by the witness; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." Section one of the same act provides, that the above enactment—in common with certain other clauses relating to evidence—"shall apply to all courts of judicature, as well criminal as others, and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence, whether in England or in Ireland." This rule has been adopted by the committee for privileges in the house of lords. *Shrewsbury Peer*, 7 H. of L. Cas. 1, 15.

Under this statute it has been held, first, that any writings, the genuineness of which is proved to the satisfaction, not of the jury, but of the judge (see *Egan v. Cowan*, 30 Law Times, 223, in Ir. Ex.), may be used for the purposes of comparison, although they may not be admissible in evidence for any other purpose in the cause; *Birch v. Ridgway*, 1 Fost. & Fin. 270; *Creswell v. Jackson*, 2 Fost. & Fin. 24; and next, that the comparison may be made either by witnesses, or without the intervention of any witnesses at all, by the jury themselves; *Cobbett v. Kilminster*, 4 Fost. & Fin. 490, per Martin, B.; or in the event of there being no jury, by the court. If, therefore, an action be brought by the indorsee of a bill of exchange against the acceptor, who, by his plea, has denied the indorsement by the drawer, it seems that the jury may, by simply comparing the

§ 713. By the courts excluding comparison in hands a single exception is made; when a writing, proved to be that of the party whose signature is in litigation, is already in evidence, having been put in for other purposes, then it is admissible to resort to this writing in order to determine the genuineness of the litigated instrument.¹

Exception as to test paper already in court.

indorsement with the drawing, which is conclusively admitted to be genuine, find a verdict for the plaintiff, even though no witness be called to disprove the plea. See, as to the former law, *Allport v. Meek*, 4 C. & P. 267. *Taylor's Ev.* § 1667.

¹ *Solita v. Yarrow*, 1 M. & Rob. 133; *Waddington v. Cousins*, 7 C. & P. 595; *Perry v. Newton*, 1 Nev. & P. 1; 5 Ad. & E. 514; *Myers v. Toscan*, 3 N. H. 47; *State v. Carr*, 5 N. H. 367; *Van Wyck v. McIntosh*, 14 N. Y. 439; *Randolph v. Loughlin*, 48 N. Y. 458; *Williams v. Drexel*, 14 Md. 566; *Duncan v. Beard*, 2 Nott & McC. 401; *Henderson v. Hackney*, 16 Ga. 521; *North Bk. v. Buford*, 1 Duvall, 335; *Brobston v. Cahill*, 64 Ill. 358; *Goodyear v. Vosburgh*, 63 Barb. 154.

In *Moore v. U. S.* 91 U. S. (1 Otto) 270, the question is thus discussed by *Bradley, J.*:—

“The general rule of the common law, disallowing a comparison of handwriting as proof of signature, has exceptions equally as well settled as the rule itself. One of these exceptions is, that if a paper admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some other purpose in the cause, the signature or paper in question may be compared with it by the jury. It is not distinctly stated, in this case, that the writing used as a basis of comparison was admitted to be in the claimant's hand; but it was conceded by counsel that it was, in fact, the power of attorney given by

him to his attorney, in fact, by virtue of which he appeared and presented the claim to the court. This certainly amounted to a declaration, on his part, that it was in his hand, and to pretend the contrary would operate as a fraud on the court. We think it brings the case within the rule, and that the court of claims had the right to make the comparison it did.” See *Medway v. U. S.* 6 Ct. of Cl. 421; *U. S. v. Chamberlain*, 12 Blatch. 390.

As denying this exception, see *Ontlaw v. Hurdle*, 1 Jones (N. C.) L. 150; *Otey v. Hoyt*, 3 Jones (N. C.) L. 407.

See, also, remarks of *Davis, J.*, in *Rogers v. Ritter*, 12 Wall. 322.

So in *Maryland*: “In the case of *Smith v. Walton*, 8 Gill, 86, Judge Martin, delivering the opinion of this court, after adverting to the arguments in favor of the admission of evidence of comparison, and conceding it had been done in some of the American courts, declares: ‘It is in conflict with the doctrine of the common law, as enunciated in *Westminster Hall*.’ In another paragraph he says: ‘We consider it as the settled rule of the English law, which in this respect we approve and adopt, that with the exception of ancient documents (an exception standing upon the necessity of the case), signatures cannot be proved by a direct comparison of hands. By which it is meant the collation of two papers in juxtaposition, for the purpose of ascertaining by inspection if they were written by the same person.’ In support of these

§ 714. In other states it is the settled practice to admit any papers, whether in themselves relevant to the issue or not, if they can be shown to be the uncontested writ-

In some jurisdictions comparison

views, the remarks of Mr. Justice Coleridge in the leading case of *Doe, dem. of Mudd v. Suckermore*, 5 Adol. & Ellis, 730, are cited, namely: "Our law has not, during a long course of years, permitted handwriting to be proved by the immediate comparison by a witness of the paper in dispute, with some other specimen, proved to have been written by the supposed writer of the first. . . . It was familiar to lawyers that many attempts have been made to introduce this mode of proof according to the practice of the civil and ecclesiastical laws, but after some uncertainty of decision, the attempts have failed." *Bowie, J., Tome v. R. R.* 39 Md. 90-93.

So, also, in New York. "The suit was upon a single note purporting to have been made by the respondent, the signature to which he claimed to be a forgery. The plaintiff was permitted, against the respondent's objection upon the trial, to put other notes in evidence purporting to have been made by him, the signatures to some of which were admitted to be genuine, and to others claimed to be forgeries. I am unable to see how these other notes were competent evidence, and what possible bearing they could have upon the issues upon trial. As they were not competent evidence for any other purpose, they could not be received in evidence to enable the jury to compare the signatures to them with the signature to the note in suit. That such evidence is incompetent is well settled. *Van Wyck v. McIntosh*, 14 N. Y. 439; *Dubois v. Baker*, 30 N. Y. 355." *Earl, C., Randolph v. Loughlin*, 48 N. Y. 458. See, also, to same effect, *Baker v. Squier*, 1

Hun, 448; *S. C.* 3 S. C. 465; *Bank of Com. v. Mudgett*, 44 N. Y. 514; *S. C.* 45 Barb. 663; *Ellis v. People*, 21 How. Pr. 356. In criminal cases comparison of hands is in any view inadmissible. *People v. Spooner*, 1 Den. 343.

To the same effect is a learned opinion of Walker, J., in *Brobston v. Cahill*, 64 Ill. 358.

In *Foster's Will*, Supt. Ct. Mich. 1876, reported in 8 Am. Law Times Rep. 412, and commented on (see *supra*, § 602), it was held not to be error to refuse to require a jury, when they do not ask for it, to take to their jury room a will that is in suit before them, for the purpose of comparing the body of the document with the signature, to see if it is not vitiated by forgery.

"Every one knows," said Campbell, J., "how very unsafe it is to rely upon any one's opinions concerning the niceties of penmanship. The introduction of professional experts has only added to the mischief instead of palliating it, and the results of litigation have shown that these are often the merest pretenders to knowledge, whose notions are pure speculation. Opinions are necessarily received, and may be valuable, but at best this kind of testimony is a necessary evil. Those who have had personal acquaintance with the handwriting of a person are not always reliable in their views; and single signatures, apart from some known surroundings, are not always recognized by the one who made them. Every degree of removal beyond personal knowledge into the domain of what is sometimes called, with great liberality, scientific opinion, is a step towards greater uncertainty, and the

ings of the party whose signature is disputed.¹ In Pennsylvania, however, it is said that at common law the proof from comparison of hands must be viewed as supplementary, and cannot be relied on exclusively,² and that the comparison is to be made by the jury, not by experts.³ To the ad-

science which is so generally diffused is of very moderate value. Subject to cross-examination, it may be reduced to the minimum of danger. In a jury room, without any check or corrective, it would be very dangerous indeed.

"The question of allowing papers not otherwise in the case to be received and proved for purposes of comparison was disposed of in *Vinton v. Peck*, 14 Mich. 287, and we have seen no reason to change our opinion."

¹ *Hammond's case*, 2 Greenl. 33; *Myers v. Toscan*, 3 N. H. 47; *State v. Hastings*, 53 N. H. 452; *Adams v. Field*, 21 Vt. 256; *State v. Ward*, 39 Vt. 225; *Homer v. Wallis*, 11 Mass. 309; *McKeone v. Barnes*, 108 Mass. 344; *Moody v. Rowell*, 17 Pick. 490; *Richardson v. Newcomb*, 21 Pick. 315; *Com. v. Eastman*, 1 Cush. 189; *Keith v. Lothrop*, 10 Cush. 453. See *Martin v. Maguire*, 7 Gray, 177; *Com. v. Williams*, 105 Mass. 62; *Lyon v. Lyman*, 9 Conn. 55; *McCorkle v. Binns*, 5 Binney, 340; *Bank of Lancaster v. Whitehill*, 10 S. & R. 110; *Baker v. Haines*, 6 Whart. R. 284; *Travis v. Brown*, 43 Penn. St. 9; *Haycock v. Greup*, 57 Penn. St. 438; *Bragg v. Colwell*, 19 Oh. St. 407; *Van Sickle v. People*, 29 Mich. 61; *Robertson v. Miller*, 1 McMull. (S. C.) 120; *Mayo v. State*, 30 Ala. 32; *Whitney v. Bunnell*, 8 La. An. 429; *State v. Fritz*, 23 La. An. 55; *State v. Scott*, 45 Mo. 302; *Smith v. Fenner*, 1 Gall. 170.

² *Haycock v. Greup*, 57 Penn. St. 438.

³ *Travis v. Brown*, 43 Penn. St. 9; *Clayton v. Siebert*, 3 Brews. 176. See

State v. Scott, 45 Mo. 302; and see *contra*, *Huston v. Schindler*, 46 Ind. 38.

As to Pennsylvania statute admitting such testimony in criminal cases, see *Brightly's Purd.* i. 631.

As to Iowa statute, to same effect, see *Baker v. Mygatt*, 14 Iowa, 131.

In Pennsylvania, to prove the writing of a person deceased at least forty years previously, witnesses are allowed to speak from a comparison with signatures and writings in family records, admitted by the family to be in the same handwriting; from letters in possession of the family, purporting to be signed by the party; and from official documents acted upon as genuine. *Sweigart v. Richards*, 8 Penn. St. 436.

So it has been held in the same state that a witness, although he cannot base his testimony exclusively on comparison of hands, can refresh his memory by inspecting genuine writings; *McNair v. Com.* 26 Penn. St. 388; see, to same effect, *Redford v. Peggy*, 6 Rand. (Va.) 316; and that he may base his judgment on comparison of hands when he saw the signature attached to the test paper, or when the party admitted such signature to be his; *Power v. Frick*, 2 Grant (Penn.) Cas. 306. See, as giving a still more liberal rule, *Travis v. Brown*, 43 Penn. St. 9.

In South Carolina, other papers, proved or admitted to have been written by the party whose handwriting is in contest, are receivable "in aid of doubtful proof;" but the "testimony is not entitled to any very high respect or consideration." *Bennett v.*

mission of a test paper, it is essential that it should be proved to be genuine, to the satisfaction of the court.¹

§ 715. We have already seen,² that a party cannot make testimony for himself by writing specimens for the instruction of witnesses afterwards to be called as to his handwriting. By the same reasoning, a party cannot be permitted to get up in this way test papers to be used subsequently for comparison of hands.³

§ 716. The mere finding of a diary on a party, with an admission by him that it belonged to him, is not a sufficient authen-

Matthewes, 5 S. C. 478; citing *Boman v. Plunkett*, 2 McC. 518; *Bird v. Miller*, 1 McM. 125.

¹ "On the question whether the signature of the will was genuine, the letters which the appellant had received, purporting to be from the testator, in answer to her letters to him, were not admissible as standards of comparison. Such standards must be established by clear and undoubted proof. *Commonwealth v. Eastman*, 1 Cush. 189; *Martin v. Maguire*, 7 Gray, 177; *Bacon v. Williams*, 13 Gray, 525; 1 Greenl. Ev. § 531, and cases cited. These letters were not thus proved. "The testimony of the persons who were called to express their opinions whether a man could, within a short time, so improve his handwriting, as shown by the standard signatures of the testator, as to make a signature of as good a handwriting as that of the will, was also incompetent. It was not a subject for the testimony of experts." *Chapman, C. J., McKee v. Barnes*, 108 Mass. 347.

In a still later case we have the following:—

"Upon the question whether a given writing or written word is sufficiently proved to have been written by the defendant to allow it to be submitted to the jury as a standard of comparison, the judge at the trial

must pass in the first instance. So far as his decision is of a question of fact merely, it must be final, if there is any proper evidence to support it. As in all questions of that nature, exceptions to the ruling at the trial will be sustained only when they show clearly that there was some erroneous application of the principles of law to the facts of the case, or that the evidence was admitted without proper proof of the qualifications requisite for its competency. *Foster v. Mackay*, 7 Met. 531; *Rich v. Jones*, 9 Cush. 329; *Gorton v. Hadsell*, 9 Cush. 508; *Quinsigamond Bank v. Hobbs*, 11 Gray, 250; *Commonwealth v. Mullins*, 2 Allen, 295; *Doud v. Hall*, 8 Allen, 410; *Lake v. Clark*, 97 Mass. 346; *Commonwealth v. Morrell*, 99 Mass. 542; *Gott v. Adams Express Co.* 100 Mass. 320; *Presbrey v. Old Colony Railroad*, 103 Mass. 1; *O'Connor v. Hallinan*, *Ibid.* 547; *Gossler v. Eagle Sugar Refinery*, *Ibid.* 331; *Commonwealth v. Williams*, 105 Mass. 62; *Lawton v. Chase*, 108 Mass. 238; *Nunes v. Perry*, 113 Mass. 274." *Wells, J., Commonwealth v. Coe*, 115 Mass. 503. And see cases cited in prior notes.

² *Supra*, § 707.

³ This point is well shown in the argument of Ames, J., in *King v. Donahue*, 110 Mass. 155.

tication of the writing to justify its use as a standard.¹ Press copies cannot be introduced as a basis of comparison, even where the original would be admissible;² nor can photographic copies.³

§ 717. By Mr. Best, the reasons for the exclusion of this form of testimony have been summed up⁴ as follows: Unreasonableness of exclusion of comparison of hands.
 "1st, that the writings offered for the purpose of comparison with the document in question might be spurious; and, consequently, that before any comparison between them and it could be instituted, a collateral issue must be tried, to determine their genuineness. Nor is this all: if it were competent to prove the genuineness of the main document by comparison with others, it must be equally so to prove that of the latter by comparison with fresh ones, and so the inquiry might go on *ad infinitum*, to the great distraction of the attention of the jury, and delay in the administration of justice.⁵
 2dly, that the specimens might not be fairly selected.⁶ 3dly, that the persons composing the jury might be unable to read, and, consequently, unable to institute such a comparison.⁷ As to the last of these objections," Mr. Best replies, "it does not seem

¹ Van Sickle v. People, 29 Mich. 61.

² Com. v. Eastman, 1 Cush. 189. See Com. v. Jeffries, 7 Allen, 561. See *supra*, § 93.

³ *Supra*, § 676.

"The testimony of the photographer comes within the same principle as that of Paine. It was offered to establish the forgery of the certificates in controversy, by comparing them with copies (obtained by photographic processes, either magnified or of the natural size) of certain signatures assumed or admitted to be genuine, and pointing out the differences between the supposed genuine and disputed signatures. As a general rule, in proportion as the media of evidence are multiplied, the chances of error or mistake are increased. Photographers do not always produce exact fac-similes of the objects delineated, and however indebted we may be to that beautiful science for much that is use-

ful as well as ornamental, it is at best a mimetic art, which furnishes only secondary impressions of the original, that vary according to the lights or shadows which prevail whilst being taken." Bowie, J., Tome v. Parkersburg R. R. Co. 39 Md. 90, 91-93. Bartol, C. J., and Alvey, J., dissenting.

⁴ Best's Ev. § 238.

⁵ Per Coleridge, J., in Doe d. Mudd v. Suckermore, 5 A. & E. 706, 707; 2 Stark. Ev. 516, 3d ed.; R. v. Sleigh, Surrey Sum. Ass. 1851, per Alderson, B., MS.

⁶ *Ibid.*; and per Dallas, C. J., in Burr v. Harper, Holt N. P. C. 420.

⁷ Per Lord Kenyon, C. J., in Macferson v. Thoytes, 1 Peake, 20; per Dallas, C. J., in Burr v. Harper, Holt N. P. C. 420; per Yates, J., in Brookbald v. Woodley, 1 Peake, 20, note a; per Lord Eldon, C., in Eagleton v. Kingston, 8 Ves. 475.

satisfactory logic to prohibit a jury which can read from availing themselves of that means for the investigation of truth, because other juries might, from want of education, be disqualified from so doing; if some men are blind, that is no reason why all others should have their eyes put out. Nor is the second objection very formidable: it is not always easy to obtain unfair specimens, and should such be produced, it would be competent to the opposite party to encounter them with true ones." The first objection Mr. Best regards as having more force; though this force, he argues, is much diminished by the statutes authorizing either party to call, before trial, for inspection, for papers in his opponent's hands. And the objection is still further weakened by the limitation we have just stated; that no test paper, written for the purpose, can be introduced as a standard. The objection of *secondariness*, which is not noticed by Mr. Best, is still less tenable. We refuse, for instance, to compare a contested writing with a series of uncontested writings, because this is second hand evidence. But why any more second hand than is the evidence of a witness who saw the alleged writer sign his name to another instrument, and who now comes in to compare his *recollection* of the other instrument with the litigated writing? Suppose, for instance, a servant, with no especial aptitude or practice in examining handwriting, sees his master sign a check, and is then called to compare a litigated writing with his recollection of that which he saw his master write? His basis of comparison, in this case, is a mere impression; an impression made on a mind with almost as little susceptibility for receiving and retaining the differentia of handwriting as has a stone in the open air for receiving a photographic impress of a landscape. His impression, even if tolerably accurate, is peculiarly open to be defaced by time or deformed by interest. He cannot be tested on cross-examination as to the grounds of this impression, because he has no language to express the minuter shades of identification and distinction in such matters, even if he had the capacity to take in these shades. On the other hand, the expert who takes an uncontested writing as a test, takes, not a second hand recollection of a thing, but the thing itself, and applies to it faculties which are so cultivated as to be able not only to detect the subtle idiosyncrasies which the non-literary man cannot observe, but to

explain these idiosyncrasies, by putting the writings side by side, to the court and jury. Or, dropping the expert, and supposing the comparison to be made by court and jury, it cannot be doubted that, if we compare the average of witnesses called to speak from their recollections of another's writing, and the average of judges and jurors, we must conclude that the latter are at least as capable as the former of forming an unbiased and intelligent judgment as to the similarity of hands. The question, then, comes down to this, Which is the most secondary of the two bases of comparison,—the writing produced in court, or the witness's recollection of such writing? It is unreasonable to call the recollection primary and the writing secondary, when really it is the recollection that is secondary and the writing primary.¹

¹ "All evidence of handwriting, except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge. That knowledge may have been acquired, either by seeing the party write, in which case it will be stronger or weaker according to the number of times and the periods and other circumstances under which the witness has seen the party write, but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then merely signing his surname; or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards personally communicated with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers producing further correspondence or acquiescence by the party in some matter to which they relate; or by any other mode of communication

between the party and the witnesses, which, in the ordinary course of transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party; evidence of the identity of the party being of course added *alimunde*, if the witness be not personally acquainted with him. These are the only modes of acquiring a knowledge of handwriting which have hitherto, as far as I have been able to discover in our law, been considered sufficient to entitle a witness to speak as to his belief in a question of handwriting.

"In both the witness acquires his knowledge by his own observation upon facts coming under his own eye, and as to which he does not rely on the information of others; and the knowledge is usually, and especially in the latter mode, acquired incidentally, and, if I may say so, unintentionally, without reference to any particular object, person, or document." Patterson, J., *Doe v. Suckermore*, 5 A. & E. 730.

Mr. Chabot's exposition of the handwriting of Junius will illustrate the value of this evidence. See, also, the fac-similes of Junius's writing in the fourth volume of the Chatham Corre-

§ 718. By the Roman law, the duty of comparison of hands is properly assignable to experts.¹ In our own law, an expert, apart from the vexed question of comparison of hands, is admissible to determine whether a contested writing is feigned or natural;² though in absence of evidence on behalf of the party charged that the signature is simulated, an expert will not be received to prove it was not simulated.³ So experts are permitted to testify as to the period

spondence, and a very ingenious article in the London Times of May 22, 1871.

Nowhere, however, has the value of this kind of evidence been better shown than in Chief Justice Cockburn's masterly charge in the Tichborne trial, *R. v. Castro*, Charge, ii. 770 *et seq.*, to which the reader is particularly referred.

Errors of spelling may be used to prove identity of authorship. *R. v. Castro*, Charge of Cockburn, C. J.; *U. S. v. Chamberlain*, 12 Blatchf. 390; *Com. v. Coe*, 115 Mass. 481.

¹ L. 20, c. iv. 21.

² *Sweetzer v. Lowell*, 33 Me. 448; *Withee v. Row*, 45 Me. 571; *Moody v. Rowell*, 17 Pick. 490; *Com. v. Webster*, 5 Cush. 295; *Demeritt v. Randall*, 116 Mass. 331, quoted *infra*, § 721; *Lyon v. Lyman*, 9 Conn. 55; *Lansing v. Russell*, 3 Barb. Ch. 325; *Goodyear v. Vosburgh*, 63 Barb. 154; *Vanwyck v. McIntosh*, 14 N. Y. 439; *Dubois v. Baker*, 30 N. Y. 355; *People v. Hewitt*, 2 Park. C. R. 20; *Hubble v. Vanhorne*, 7 S. & R. 185; *Calkins v. State*, 14 Ohio St. 222; *Jones v. Finch*, 37 Miss. 461.

³ *Kowing v. Manly*, 49 N. Y. 193; *S. C.* 57 Barb. 179, qualifying *People v. Hewitt*, 2 Parker C. R. 20. See, also, to same effect, *Merchant's Will*, 1 Tucker (N. Y.), 151. See *People v. Spooner*, 1 Denio, 343.

In *Fisher v. Hoffman*, 2 Weekly Notes of Cases, 18, which was a suit by a payee against the maker's ex-

ecutor, the note was admitted in evidence, though over a figure in the date another had been written, and though the statute of limitations would have barred the suit if the original figure had been correct. Evidence was admitted of one who saw the plaintiff offer a note of similar amount, which he then said he had dated the same day as the note in evidence, to the maker. The witness then heard the maker write, as he supposed, signing the note, which looked like the one in suit. Expert testimony was admitted to show that the body of the note and the date had been written by one person at the same time. It was held that the above evidence was properly admitted.

"The testimony," said the court, "of persons expert in the examination of signatures, in detecting the feigned from the true, has its most apt application in a case such as this, where the purpose was to detect an alleged forgery, or to corroborate a genuine signature by the application of skilful tests to the face of the paper."

Evidence by an expert, however, that a writing is *not* simulated, cannot be received until simulation is set up on the other side.

"We think that the evidence offered to prove that the order produced by the defendants was not in a simulated handwriting was properly rejected. The plaintiff had not intro-

to which a writing may be assigned;¹ as to the nature of the ink or other material used;² whether a certain writing shows comparative ease and facility;³ whether certain figures in a check have been changed;⁴ what is the difference between the substance of an instrument and a forged addition;⁵ whether certain words were written before a paper was folded;⁶ what is the meaning of certain illegible marks or signs;⁷ whether the whole of an instrument was written by the same hand, with the same pen and ink, and at the same time;⁸ whether a certain

duced any evidence to show that it was in a simulated handwriting, but had testified to the fact that it was not written by him. It was incumbent upon the defendants to prove that the order was in the handwriting of the plaintiff; and we do not think that, as the evidence stood, the opinion of an expert, that the signature was not in a simulated hand, was competent for the purpose of establishing that it was the plaintiff's. In the cases cited, 3 B. Ch. 325, and 17 Pick. 490, for the purpose of proving that a mark or signature was not genuine, evidence of experts was admitted, to show that the writing was simulated. The only case cited in which evidence was admitted to show that the writing was not simulated is that of *The People v. Hewit*, 2 Park. Cr. R. 20, where, on a trial of an indictment for forgery, the prisoner was allowed to prove, by an expert, that the signature was not in a simulated hand. Whatever effect might be given to such evidence, in a criminal trial, for counterfeiting or forgery, as to which we express no opinion, we do not think it competent for the purpose of proving the genuineness of a signature against a party sought to be charged thereby." *Rapallo, J., Kowing v. Manly*, 49 N. Y. 203.

¹ *Doe v. Suckermore*, 5 A. & E. 703; *R. v. Williams*, 8 C. & P. 434; *Tracy Peerage*, 10 Cl. & Fin. 154; *Davis v.*

Mason, 4 Pick. 156. See *People v. Spooner*, 1 Denio, 343.

² *Dubois v. Baker*, 30 N. Y. 355.

³ *Demeritt v. Randall*, 116 Mass. 331, quoted *infra*, § 721.

⁴ *Nelson v. Johnson*, 18 Ind. 329.

⁵ *Hawkins v. Grimes*, 13 B. Mon. 258; though see *Daniel v. Toney*, 2 Mete. (Ky.) 523.

⁶ *Bacon v. Williams*, 13 Gray, 525.

⁷ *Stone v. Hubbard*, 7 Cush. 595; *Collender v. Dinsmore*, 55 N. Y. 200.

⁸ *Quinsigamond Bk. v. Hobbs*, 11 Gray, 250; *Fulton v. Hood*, 34 Penn. St. 365. See *Jewett v. Draper*, 6 Allen, 434.

"The fourth assignment of error is, that the court erred in admitting the testimony of so-called experts in regard to receipts which were in evidence. It was alleged, and direct evidence was given by the plaintiff below to prove, that the receipts had been altered, and then experts were offered to show that these alterations were not made at the same time with the body of the receipt. It was ruled in *Fulton v. Hood*, 10 Casey, 365, that the testimony of experts is receivable, in corroboration of positive evidence, to prove that, in their opinion, the whole of an instrument was written by the same hand, with the same pen and ink, and at the same time. This case is indeed the converse of that, but the principle is

bank note is counterfeit,¹ and for this purpose business men, long familiar with the notes, can be called;² whether certain words were written over others;³ and as to the date and meaning of certain words upon an erasure.⁴ It has, however, been held inadmissible to ask an expert as to a remote contingency as to which no special professional experience is needed to speak;⁵ nor can an expert be examined as to how far a person may improve his handwriting in a given time.⁶

§ 719. When comparison of hands is permitted, an expert can be called to make such comparison.⁷ It has, however, been said that an expert cannot, as to an ancient writing, be admitted to give his conclusion from a comparison of hands,⁸ though if no other proof is attainable such should be received for what it is worth.⁹

undoubtedly the same, whether the evidence is of experts to attack or support the instrument." Sharswood, J., *Ballantine v. White*, 77 Penn. St. 25.

¹ *Jones v. Finch*, 37 Miss. 461.

² *State v. Cheek*, 13 Ired. L. 114.

³ *Dubois v. Baker*, 30 N. Y. 355.

⁴ *Ibid.*; and *S. C.* 40 Barb. 556; *Vinton v. Peck*, 14 Mich. 287; though see *Swan v. O'Fallon*, 7 Mo. 231.

⁵ *Thayer v. Chesley*, 55 Me. 393.

⁶ *McKeone v. Barnes*, 108 Mass. 344.

⁷ Benth. Jud. Ev. iii. 599; *U. S. v. Keen*, 1 McLean, 429; *U. S. v. Chamberlain*, 12 Blatch. 390; *Hammond's case*, 2 Greenl. 33; *Woodman v. Dana*, 52 Me. 9; *Furber v. Hilliard*, 2 N. H. 480; *Carr v. State*, 5 N. H. 371; *State v. Shinborn*, 46 N. H. 497; *State v. Ravelin*, 1 Chipm. 295; *State v. Ward*, 39 Vt. 225; *Moody v. Rowell*, 17 Pick. 490; *Com. v. Riley*, *Thacher's C. C.* 67; *Amherst Bank v. Root*, 2 Mete. 522; *Com. v. Williams*, 105 Mass. 62; *Lyon v. Lyman*, 9 Conn. 55; *People v. Caryl*, 12 Wend. 547; *Phœnix Bk. v. Philip*, 13 Wend. 81; *Finch v. Gridley*, 25 Wend. 469; *Roe v. Roe*, 40 N. Y. Sup. Ct. 1; *Jackson v. Murray*, Anthon, 105; *West v. State*, 22 N. J. L. 212; *Com.*

v. Smith, 6 S. & R. 568; *Hubley v. Vanhorne*, 7 S. & R. 185; *Lodge v. Phipper*, 11 S. & R. 333; *Powers v. Friek*, 2 Grant (Penn.) Cas. 306; *Sweigart v. Richards*, 8 Penn. St. 436; *Burkholder v. Plank*, 69 Penn. St. 235; *Ballantine v. White*, 77 Penn. St. 20. *Contra*, *Titford v. Knott*, 2 Johns. Cas. 211; *Bank of Penn. v. Haldeman*, 1 Penn. 161; *Niller v. Johnson*, 27 Md. 6; *Huston v. Schindler*, 46 Ind. 38; *State v. Harris*, 5 Ired. 287; *Com. v. Tutt*, 2 Bailey, 44; *Bird v. Miller*, 1 McM. 125; *Bennett v. Matthewes*, 5 S. C. 478; *Johnson v. State*, 35 Ala. 370; *Moye v. Hernndon*, 30 Miss. 110; *Hanley v. Gandy*, 28 Tex. 211.

"It may be considered as well settled in this state (Pennsylvania), by *Fulton v. Hood*, 10 Casey, 365; and *Travis v. Brown*, 7 Wright, 9, that after direct evidence has been given on the subject of handwriting, the evidence of experts is admissible in corroboration." Sharswood, J., *Burkholder v. Plank*, 69 Penn. St. 235; *S. P.*, *Ballentine v. White*, 77 Penn. St. 20.

⁸ *Fitzwalter Peerage Case*, 10 Cl. & F. 193. *Supra*, § 704.

⁹ *Supra*, § 704.

§ 720. Photographers, who have been accustomed to scrutinize handwriting in reference to forgeries, and have been in the habit of using photographic copies for this purpose, may be examined as experts in questions of forgery, even though their opinion is founded partly on photographic copies, which they have themselves made, and which have been put in evidence.¹ To enable, however, such photographic copies to be put in evidence, their accuracy and fairness must be proved.²

Photographers may be received as experts.

§ 721. An expert is open to cross-examination as to his qualifications,³ and he may be probed by test papers that may be presented to him.⁴ In a Massachusetts case, finally decided in 1875, it appeared that on the trial, which was as to the genuineness of a will by a woman named Ireland, the appellants put in evidence a prior will and codicil of the alleged testatrix, and then called experts in handwriting, who testified that in their opinion, formed by comparison of the signatures in these instruments, and in other instruments proved to have been signed by the testatrix, she did not sign the second will, which was directly in issue; that it was not her signature, and that it was not signed by the same person who signed the other instruments in evidence. One of these experts was asked, upon comparing the signatures with the other instruments in evidence, and referred to as standards with the signature to the proposed will, "Which exhibits the greater ease and facility of writing?" His answer was, "The signature to the will shows the most ease, the most skill and cultivation of the art of penmanship." This question and answer were admitted under objection. Another expert testified, under objection, that the signature to the will was not, in his opinion, written by the same hand as the signatures to the other writings; that it was entirely unlike, and could not have been written by the same hand. Other experts, witnesses for the appellants, were asked, under objection, similar questions,

Experts in writing may be cross-examined as to skill.

¹ *Marcy v. Barnes*, 16 Gray, 161. 36, it was ruled that such copies could See, however, *Taylor Will case*, 10 Abb. (N. Y.) Pr. N. S. 301; *Tyler v. Todd*, 36 Conn. 218. § 676.

² *Ibid.* In *Tome v. R. R.* 39 Md. ³ See *supra*, §§ 438-454.

⁴ *Supra*, § 710.

and gave substantially the same answers. In the cross-examination of one of the experts for the appellants, who had given his evidence in the same way against the signature of the will, he was asked whether he had compared the signature with the rest of the writing on and in the will. He said he had not. He was asked further to look at and examine the rest, and state whether the handwriting in the signature to the will was the same or similar to any of the rest found on the instrument, or in the body of it. He declined to express an opinion without the opportunity for a critical examination. He was asked repeatedly on the cross-examination to look at the body of the will and compare it with the handwriting upon the stand, or take it and look at it so as to express an opinion on the identity of the hands; but he repeatedly declined doing so, stating that he could not form an opinion without a critical examination of the instrument. The question was repeated again, and the judge ruled that it should not be again put, and declined to order the witness to answer further, to which exceptions were alleged. The executor proved in whose handwriting the remainder of the instrument was. The jury found for the appellants, and the executor alleged exceptions. These exceptions, however, were overruled.¹

§ 722. Elsewhere² the importance of guarding expert testimony has been discussed; and it is obvious that the application of the checks suggested is of peculiar importance in questions of identity of handwritings. If the expert can produce in court the writings, and explain the grounds of his conclusions, the difficulties are much reduced; but it must be remembered that there are few branches of law on which interests so momentous (*e. g.* devolution of large estates, convictions of forgery) depend upon tests so exquisitely

¹ "The experts," said Gray, C. J., "were rightly permitted to testify to their opinion of the genuineness of the signature of the testatrix, and to their reasons for such opinion. *Moody v. Rowell*, 17 Pick. 490; *Commonwealth v. Webster*, 5 Cush. 295; *Keith v. Lothrop*, 10 Cush. 453. How many times the same question should be repeated on cross-examination, and how

far the witness should be compelled to answer, were matters within the discretion of the presiding judge, and are not subjects of exception." *Demeritt v. Randall*, 116 Mass. 331.

That an expert must have for this purpose special aptitude, see *Goldstein v. Black*, 50 Cal. 462.

² *Supra*, § 454.

delicate as those applied to handwriting. It is well known that in cases of peculiar difficulty, when the difference, if there be any, between two handwritings is only noticeable by perceptions the most sensitive, experts, no matter how conscientious, often take unconsciously such a bias from the party employing them as to give to their judgment the almost infinitely slight impulse that turns the scale; nor is it strange that in an instrument so delicate, aberrations from its true course should be produced by attractions or repulsions otherwise unappreciable. If an expert could be hermetically sealed in from such extraneous influences, his judgment might be depended on at least for impartiality. This, however, is impracticable. A jury is bound, therefore, to accept the opinion of an expert as to handwriting, even when uncontradicted, as an argument rather than a proof;¹ and to make allowance for all the disturbing influences by which the judgment of the expert may be moved.²

¹ See *Tracy Peerage*, 10 Cl. & Fin. 191; *Gurney v. Langlands*, 5 B. & A. 330; *R. v. Crouch*, *supra*, § 707; *Cowan v. Beall*, 1 MacArthur, 270; *Borland v. Walrath*, 33 Iowa, 130.

² In a suit tried in 1876, before the English probate court, Mr. Netherclift, an "expert" in handwriting, swore definitely and peremptorily that a will was forged, to the genuineness of which will the attesting witnesses deposed. The jury, without troubling the judge to sum up, gave a verdict for the validity of the will, and the judge declared his opinion that an unfounded and reckless charge of forgery had been preferred. It was painful, he added, to reflect on the enormous expense that had been incurred because the "experts" thought that their opinion, that a man did not make a particular signature, ought to outweigh any amount of positive testimony that he did so. Subsequently, at the Guildhall police court, on Mr. Netherclift giving his opinion that the signatures to certain checks were genuine, counsel proceeded to cross-ex-

amine him as to what had been said by Sir James Hannen in reference to Davis's will. Mr. Netherclift answered that he had read the remarks of Sir James Hannen, and he wished to say something thereupon. The magistrate said he must decline to hear anything about any case that was not before the court; but Mr. Netherclift persevered, and said that he believed the signature to that will to be "a rank forgery," and he should believe so to the day of his death. Mr. Seaman having been an attesting witness to the will, appropriated these words to himself, and brought an action of slander for them, alleging that their meaning was that he had been guilty of forging the signature to the will, or of aiding and abetting that offence. It was urged by Mr. Netherclift's counsel that under the circumstances no action could be maintained, and, therefore, that the judge ought to direct a verdict for the defendant, as was done in the case of *Dawkins v. Lord Rokeby*, 4 F. & F. 806. But Lord Coleridge preferred to let the case go to the jury,

§ 723. By the strict rule of the English common law, when there are subscribing witnesses to an instrument, such witnesses should be called to prove its execution, or their absence should be duly accounted for.¹ The statutes allowing parties to be witnesses do not of themselves abrogate this rule.² When a statute requires an instrument to be subscribed by a certain number of competent witnesses, these witnesses must have been competent at the time of the attestation.³

who found for the plaintiff with £50 damages, leave being reserved to the defendant to move the full court to set aside the verdict. The judge put to the jury whether the words complained of were spoken "in the course of giving evidence," or whether the defendant's evidence was really over, and he made the statement "as a mere volunteer. The jury found against the defendant on this question, which was treated as decisive of the case." *Saturday Review*, March 25, 1876. On the case coming up before the court in banc, it was held that the statement was privileged, and that the action would not lie, although it was found by the jury that the words were spoken maliciously, and not in good faith as a witness; and though the judge held there was evidence to justify this finding. *Seaman v. Netherelift*, L. R. 1 C. P. D. 540; affirmed finally on appeal, Dec. 1876.

¹ *Doe v. Durnford*, 2 M. & Sel. 62; *Bowman v. Hodgson*, L. R. 1 P. & D. 362; *Citizens' Bk. v. Steamboat Co.* 2 Story, 16; *Pullen v. Hutchinson*, 25 Me. 249; *Foye v. Leighton*, 24 N. H. 29; *Harding v. Cragie*, 8 Vt. 508; *Whitaker v. Salisbury*, 15 Pick. 534; *Barry v. Ryan*, 4 Gray, 523; *Henry v. Bishop*, 2 Wend. 575; *King v. Smith*, 21 Barb. 158; *Walsh's Will*, 1 Tucker (N. Y.), 132; *Corlies v. Vannote*, 16 N. J. L. 324; *McMahan v. McGrady*, 5 Serg. & R. 314; *Boyer v. Norris*, 1 Harr. (Del.) 22; *Handy v.*

State, 7 Har. & J. 42; *McCord v. Johnson*, 4 Bibb, 531; *State v. Chaney*, 9 Rich. (S. C.) 438; *Barber v. Terrell*, 54 Ga. 146; *Bennet v. Robinson*, 3 St. & Port. 227; *Chaplain v. Briscoe*, 19 Miss. 372; *Glasgow v. Ridgely*, 11 Mo. 34; *Brock v. Saxton*, 5 Ark. 708; *Shepherd v. Goss*, 1 Overt. (Tenn.) 487.

Under the English statute it is still necessary to call one or more of the subscribing witnesses to prove all instruments executed under powers, where the parties creating such powers have thought proper, for better security, to require the execution to be attested. *Taylor's Ev.* § 1638.

² *Hodnett v. Smith*, 2 Sweeny (N. Y.), 401; *S. C.* 10 Abb. Pr. N. S. 86; 41 How. Pr. 190. See *Weigand v. Sichel*, 4 Abb. (N. Y.) App. 592; *Bowling v. Hax*, 55 Mo. 446; *Kalmes v. Gerrish*, 7 Nev. 31. *Infra*, §§ 885-9.

³ *Best's Ev.* §§ 125, 305, 607; *Goss v. Tracy*, 1 P. Wms. 289; *Bernett v. Taylor*, 9 Ves. 381; *Davis v. Dinwoody*, 4 T. R. 678; *Sullivan v. Sullivan*, 106 Mass. 474; *Hamilton v. Marsden*, 6 Binn. 45.

"By the General Statutes, c. 92, § 6, a will must be subscribed by three or more competent witnesses. They must be competent at the time of the attestation of the will. By the common law, it was a settled principle that husbands and wives could not in any case be admitted as witnesses for and

§ 724. Matters collateral to the execution of a document, however, may be proved independently of the attesting witness.¹ Thus it is not necessary to call the attesting witness when the object is to prove a receipt at the foot of a document which has attesting witnesses, the receipt not being so attested ;² nor to prove the identity of one deed with another ;³ nor to prove any preliminary matter which is a condition precedent to calling the attesting witnesses.⁴

Collateral matters do not require attesting witness.

§ 725. The rule requiring the production of attesting witnesses is one of the few in English practice which the court employs for its own instruction, and it is applied irrespective of the intentions of the parties. So resolute are the courts in insisting on this rule, that in cases where subscribing witnesses are necessary, a party's admission has been held insufficient to dispense with the production of the attesting witness, even though such admission be made in open court ;⁵ or by answer to bill of discovery ; or other answer under oath ;⁶ or even, so far has the rule been pushed, by the answers of the party himself when called as a witness in the cause.⁷ Yet a party, so has it been held (somewhat inconsistently if the rule

So to admit execution of document, but not when there are attesting witnesses.

against each other, independently of the question of interest. None of our statutes have changed the rule in this respect as to the attestation of wills, and the rule applies to such attestation. *Davis v. Dinwoody*, 4 T. R. 678 ; *Hatfield v. Thorp*, 5 B. & Ald. 589 ; *Sullivan v. Sullivan*, 106 Mass. 474.

"As the wife of the testator in this case was not a competent witness when the will was executed, his death did not make her competent." *Chapman, C. J., Pease v. Allis*, 110 Mass. 157.

¹ *Fairfax v. Fairfax*, 2 Cranch C. C. 25 ; *Ayers v. Hewett*, 19 Me. 281 ; *Curtis v. Belknap*, 21 Vt. 433 ; *Shoenberger v. Hackman*, 37 Penn. St. 87.

² *Milligan v. Mayne*, 2 Cranch C. C. 210.

³ *Planters' Bank v. Willis*, 5 Ala. 770.

⁴ See *supra*, § 78.

⁵ *Johnson v. Mason*, 1 Esp. 89 ; *Abbot v. Plumbe*, 1 Dougl. 216 ; *R. v. Harringworth*, 4 M. & Sel. 353 ; *Doe v. Penfold*, 8 C. & P. 536 ; *Turner v. Green*, 2 Cranch C. C. 202. See, however, *Blake v. Sawin*, 10 Allen, 340 ; *Fox v. Reil*, 3 Johns. R. 477 ; *Minard v. Mead*, 7 Wend. 68 ; *Henry v. Bishop*, 2 Wend. 575 ; *King v. Smith*, 21 Barb. 158 ; *Zerby v. Wilson*, 3 Ohio, 42 ; *Lands v. Crocker*, 3 Brev. (S. C.) 40 ; *Morgan v. Patrick*, 7 Ala. 185.

⁶ *Call v. Dunning*, 4 East, 53 ; *Kinney v. Flynn*, 2 R. I. 319. See *Hollenback v. Fleming*, 6 Hill (N. Y.), 303 ; *Henry v. Bishop*, 2 Wend. 505.

⁷ *Whyman v. Garth*, 8 Ex. R. 803 ; *Story v. Lovett*, 1 E. D. Smith, 153 ; *Barry v. Ryan*, 4 Gray, 523 ; *Brigham v. Palmer*, 3 Allen, 450. See *White v. Holliday*, 20 Tex. 679 ; *contra*, *Forsythe v. Hardin*, 62 Ill. 206.

be, as is alleged, one to be applied inexorably by the court), may estop himself by an admission of execution when such an admission is made part of an agreement for mutual concessions with the other side.¹ So the paying money into court on one of the breaches in an action of covenant, relieves the plaintiff from calling an attesting witness, even though *non est factum* is pleaded.² The party's admission is available, however, when due attempts to obtain the subscribing witnesses have failed.³ And where attesting witnesses are not necessary to the validity of the instrument, it may be *primâ facie* proved by the admission of the party, provided such admissions are clear and specific as to the writing.⁴ The same rule is affirmed in England by the Common Law Procedure Act. And such admission may be proved inferentially as well as directly.⁵

§ 726. Where it is impossible to produce an attesting witness, then the law permits the instrument to be read upon proof of the handwriting of the witness.⁶ This right has been held to exist where the witness has been spirited away by the opposite party;⁷ where he is out

¹ *Freeman v. Steggall*, 14 Q. B. 203; *Bringloe v. Goodson*, 5 Bing. N. C. 738; 8 Scott, 71; *Laing v. Kaine*, 2 B. & P. 85. See *infra*, § 1091.

² *Randall v. Lynch*, 2 Camp. 357.

³ *Greenwood v. Bethlehem*, 1 Green (N. J.), 221.

⁴ *Infra*, §§ 1089-1096; *Nichols v. Allen*, 112 Mass. 23; *Hall v. Phelps*, 2 Johns. R. 451; *Shaver v. Ehle*, 16 Johns. R. 201; *Giberton v. Ginochio*, 1 Hilt. (N. Y.) 218; *Savage v. D'Wolf*, 1 Blatch. 343; *Daniel v. Ray*, 1 Hill (S. C.), 32.

⁵ *Watson v. Brewster*, 1 Barr, 381; *Harrington v. Gable*, 2 Weekly Notes of Cases, 519 (1876). In the latter case, Woodward, J., said: "With the failure of the attempt to prove the execution of the instrument by the subscribing witness, the primary source of evidence on behalf of the plaintiff had been exhausted. . . . A resort to secondary evidence to lay ground

for the admission of the instrument, was inevitable; and that which was given, as well as much of that which was offered and rejected, was unobjectionable, for it carried on its face no indication that better evidence could have been obtained. . . . There is no difference as to the admissibility of this kind of evidence, between direct admissions and those which are incidental, or made in some other connection, or involved in the admission of some other fact."

⁶ See *R. v. St. Giles*, 1 E. & B. 642.

So as to wills, when witness is deceased. 1 Redfield on Wills, § 20; *Nickerson v. Buck*, 12 Cush. 332; *Hays v. Harden*, 6 Barr, 409; *Greenough v. Greenough*, 11 Penn. St. (1 Jones) 489; *Vernon v. Kirk*, 30 Penn. St. (6 Casey) 218.

⁷ *Clanmorris v. Mullen*, Craw. & D. Abr. Cas. 8; *Spooner v. Payne*, 4 C. B. 328.

of the jurisdiction of the court;¹ where he becomes interested so as to be incompetent;² though it is otherwise when the incapacity is caused by the party calling the witness,³ or when the attesting signature is illusory.⁴ So secondary evidence may be received when the subscribing witness cannot be found after diligent search;⁵ and the degree of diligence which may be proved in order to let in secondary evidence varies with the circumstances of the case.⁶ As to instruments executed in foreign lands, the at-

¹ *Barnes v. Trompowsky*, 7 T. R. 265; *Prince v. Blackburn*, 2 East, 250; *Glubb v. Edwards*, 2 M. & Rob. 300; *Dunbar v. Marden*, 13 N. H. 311; *Gould v. Kelley*, 16 N. H. 551; *Beattie v. Hilliard*, 55 N. H. 436; *Valentine v. Piper*, 22 Pick. 85; *Van Doren v. Van Doren*, 2 Pen. (N. J.) 745; *Den v. Van Houten*, 5 Halst. 270; *McDermott v. McCormick*, 4 Harr. (Del.) 543; *Dorsey v. Smith*, 7 Har. & J. 345; *Richards v. Skiff*, 8 Oh. St. 586; *Wiley v. Bean*, 6 Ill. 302; *Balinger v. Davis*, 29 Iowa, 512; *Selby v. Clark*, 4 Hawks, 265; *Edwards v. Sullivan*, 8 Ired. L. 302; *Price v. McGee*, 1 Brev. (S. C.) 373; *Bussey v. Whitaker*, 2 Nott & M. 374; *Foote v. Cobb*, 18 Ala. 585; *Little v. Chauvin*, 1 Mo. 626; *Clardy v. Richardson*, 24 Mo. 295; *McGarrity v. Byington*, 12 Cal. 426; *Jackson v. R. R.* 14 Cal. 18; *Teal v. Sevier*, 26 Texas, 516.

"In *Price v. The Earl of Torrington*, 1 Sm. Lead. Cases, 139, Am. ed. 1847, are collected a large number of American decisions to the point, that, when entries are made in a shopkeeper's book of accounts by a clerk who is without the limits of the state at the time of the trial, in an action to recover for the goods so charged, the charges may be read in evidence upon proof of his handwriting, the same as if he were dead; and in *Dunbar v. Marden*, 13 N. H. 311, it was held, that, where a subscribing witness re-

sides without the limits of the state, he is beyond the reach of the process of the court in the sense in which those words are used, and evidence of his handwriting may be produced in proof of the execution of the instrument. See, also, 1 Gr. Ev. § 572." *Smith, J.*, *Beattie v. Hilliard*, 55 N. H. 436.

² *Goss v. Tracy*, 1 P. Wms. 289; *Haynes v. Rutter*, 24 Pick. 242; *Packard v. Dunsmore*, 11 Cush. 283; *Hamilton v. Marsden*, 6 Binn. 45; *Keefer v. Zimmerman*, 22 Md. 274; *Umphreys v. Hendricks*, 28 Ga. 157; *McKinley v. Irvine*, 13 Ala. 681; *Robertson v. Allen*, 16 Ala. 106; *Tinnin v. Price*, 31 Miss. 422. See *supra*, § 178.

³ *Paterson v. Schenck*, 3 Green (N. J.), 434.

⁴ *Fassett v. Brown Peake's Cases*, 24.

⁵ *Falmouth v. Roberts*, 9 M. & W. 469; *Parker v. Hoskins*, 2 Taunt. 223; *Burt v. Walker*, 4 B. & A. 697; *Clarke v. Courtney*, 5 Pet. 319; *Spring v. Ins. Co.* 8 Wheat. 269; *Mills v. Twist*, 8 Johns. 121; *Henry v. Bishop*, 2 Wendell, 575; *Lausing v. Chamberlain*, 8 Wend. 620; *Clark v. Sanderson*, 3 Binn. 192; *Trammell v. Roberts*, 1 McMull. 305; *Brown v. Hicks*, 1 Ark. 232.

⁶ *Ibid.*; *Cunliffe v. Sefton*, 2 East, 183; *Morgan v. Morgan*, 9 Bing. 359; *Wilman v. Worrall*, 8 C. & P. 380; *Austin v. Rumsey*, 2 C. & Kir. 736; *Spring v. Insur. Co.* 8 Wheat. 268;

testing witnesses, it has been ruled, need not be produced, it being enough to prove the handwriting of the witness.¹ Of course insanity,² and death,³ abundantly explain non-production. But if there be two witnesses, it will not be sufficient, so long as one of them is alive, sane, free from permanent sickness, within the jurisdiction of the court, and capable of being found by diligent inquiry, to prove the signature of the other who is dead.⁴ The practice when the subscribing witness has made a mark has been already noticed.⁵

§ 727. The secondary evidence which is received, after the non-production of the witness is satisfactorily accounted for, consists, ordinarily, of proof of his handwriting.⁶ Such proof may be inferential.⁷ Proof of the handwriting of the witness, in such case, is sufficient without proving the handwriting of the party;⁸ but the latter may

Sherman v. Transp. Co. 31 Vt. 162; *Van Dyne v. Thayer*, 19 Wend. 162; *Mills v. Twist*, 8 Johns. R. 121; *Truby v. Byers*, 6 Penn. St. 347; *Tams v. Hittner*, 9 Penn. St. 441; *Clark v. Boyd*, 2 Oh. 56; *Gordon v. Miller*, 1 Ind. 531; *Powell v. Hendricks*, 3 Cal. 427; *Landers v. Bolton*, 26 Cal. 393; *Holman v. Bank*, 12 Ala. 369; *Nicks v. Rector*, 4 Ark. 251; *Delony v. Delony*, 24 Ark. 7.

¹ *McMinn v. O'Connor*, 27 Cal. 238; *McMinn v. Whelan*, 27 Cal. 300. See *Tyng v. R. R.* 12 Cush. 277.

² *Bennett v. Taylor*, 9 Ves. 381; *Currie v. Child*, 3 Camp. 283; *Neely v. Neely*, 17 Penn. St. 227.

³ *Adam v. Kerr*, 1 B. & P. 360; *Murdock v. Hunter*, 1 Brock. 135; *Dudley v. Sumner*, 5 Mass. 438; *Van Doren v. Van Doren*, 2 Pen. (N. J.) 745; *Mott v. Doughty*, 1 Johns. Cas. 230; *Armstrong v. Den*, 3 Green (N. J.), 186; *Mardis v. Shackelford*, 4 Ala. 493; *Waldo v. Russel*, 5 Mo. 387; *McGowan v. Laughlan*, 12 La. An. 242; *Howard v. Snelling*, 32 Ga. 195; *Fitzhugh v. Croghan*, 2 J. J. Marsh, 429.

⁴ *Wright v. Doe d. Tatham*, 1 A. & E. 21, 22, per Tindal, C. J.

⁵ See *supra*, § 696.

⁶ *Adam v. Kerr*, 1 B. & P. 360; *Webb v. St. Lawrence*, 3 Bro. P. C. 640; *Murdock v. Hunter*, 1 Brock. 135; *Quimby v. Buzzell*, 16 Me. 470; *Dunbar v. Marden*, 13 N. H. 311; *Dudley v. Sumner*, 5 Mass. 438; *Hommer v. Wallis*, 11 Mass. 309; *Valentine v. Piper*, 22 Pick. 95; *Armstrong v. Den*, 3 Green (N. J.), 186; *Powers v. McFerran*, 2 Serg. & R. 44; *McDermott v. McCormick*, 4 Harr. (Del.) 543; *Dorsey v. Smith*, 7 Har. & J. 345; *Clark v. Boyd*, 2 Ohio, 56; *Bussey v. Whitaker*, 2 Nott & McC. 364; *Howard v. Snelling*, 32 Ga. 195; *Thomas v. Wallace*, 5 Ala. 268; *Foote v. Cobb*, 18 Ala. 585; *McGowan v. Laughlan*, 12 La. An. 242; *Little v. Chauvin*, 1 Mo. 626; *Clardy v. Richardson*, 24 Mo. 295; *Fitzhugh v. Croghan*, 2 J. J. Marsh. 429; *Mapes v. Leal*, 27 Tex. 345. Under statute of frauds, see *infra*, § 888.

⁷ *Miller v. Dillon*, 2 T. B. Mon. 73; *Jones v. Coopridge*, 1 Blackf. 47.

⁸ *Valentine v. Piper*, 22 Pick. 90;

be cumulatively proved,¹ or alternatively.² But, as a general rule, handwriting of the party executing cannot be proved until there is *bonâ fide* but unsuccessful effort to prove the handwriting of the deceased witness.³ The admission of the party executing can be received as secondary evidence in default of proof of handwriting.⁴ Where the absent attesting witness signed by a mark, then the signature of the party executing should be proved.⁵

§ 728. If an attesting witness is sick, his deposition may be taken, or the case may be continued until his recovery; but his non-production on account of sickness will not let in other proof of execution.⁶ Blindness on part of the witness has been ruled not to be an adequate excuse for non-production.⁷

Such evidence receivable only on proof of sickness of witness.

§ 729. In English chancery practice, when a will is to be proved, all the attesting witnesses, if they can be found, must be called.⁸ In other courts, in respect to all documents requiring attestation, it is enough to admit the document, if one of several attesting witnesses be called, even though the others are attainable.⁹ But where a

Calling one attesting witness ordinarily sufficient.

Sluby v. Champlin, 4 Johns. R. 461; *McPherson v. Rathbone*, 11 Wend. 96; *People v. McHenry*, 19 Wend. 482; *Borst v. Empie*, 5 N. Y. 33; though see *Brown v. Kimball*, 25 Wend. 259.

¹ *Thomas v. Le Baron*, 8 Mete. 355; *Gelott v. Goodspeed*, 8 Cush. 411; *Clark v. Houghton*, 12 Gray, 38; *Servis v. Nelson*, 14 N. J. Eq. 94; *Turner v. Moore*, 1 Brev. (S. C.) 236; *Clark v. Boyd*, 2 Oh. 56; *Gibbs v. Cook*, 4 Bibb, 535.

² *Jones v. Lovell*, 1 Cranch C. C. 183; *McPherson v. Rathbone*, 11 Wend. 96; *Clark v. Sanderson*, 3 Binn. 192; *Raines v. Philips*, 1 Leigh, 483; *Cox v. Davis*, 17 Ala. 714; *Oliphant v. Taggart*, 1 Bay, 255.

³ *Pelletreau v. Jackson*, 11 Wend. 110. See *Farnsworth v. Briggs*, 6 N. H. 561.

⁴ *Kingwood v. Bethlehem*, 1 Green N. J.), 221. *Supra*, § 723.

⁵ *Gilliam v. Perkinson*, 4 Randolph, 325; *Watts v. Kilburn*, 7 Ga. 356. See *supra*, § 696.

⁶ *Harrison v. Blades*, 3 Camp. 457. ⁷ *Cronk v. Frith*, 9 C. & P. 197; 2 M. & R. 262; *Rees v. Williams*, 7 Exch. 51; though see *Pedler v. Paige*, 1 M. & Rob. 258.

⁸ *Gresley's Ev.* § 120; *Bootle v. Blundell*, 19 Ves. 494; *McGregor v. Topham*, 3 H. of L. Cas. 155; *Bowman v. Bowman*, 2 M. & Rob. 501. See *Charles v. Huber*, 78 Penn. St. 448.

⁹ *Andrew v. Motley*, 12 C. B. (N. S.) 526; *Adam v. Kerr*, 1 B. & P. 360; *Holdfast v. Dowsing*, 2 Str. 1254; *Belbin v. Skeats*, 1 Swab. & Tr. 148; *Jackson v. Shelden*, 22 Me. 569; *Montgomery v. Dorion*, 7 N. H. 475; *Melcher v. Flanders*, 40 N. H. 139; *Burke v. Miller*, 7 Cush. 517; *Mott v. Doughty*, 1 Johns. Cas. 230; *Powers v.*

statute prescribes several attesting witnesses as essential to the due execution of an instrument, then the absence of all of them should be accounted for, in order to let in secondary evidence of the execution.¹

§ 730. An attesting witness, being called rather by the law itself, than by the party who puts him on the stand, is open to be contradicted, or to have his testimony supplemented by such party.² So by such party he may be tested by leading questions, and by the other processes usual to cross-examination.³ It is said, however, that his general character for veracity cannot be attacked by the party calling him.⁴ A denial by a witness of his signature, if such denial be un rebutted, vacates the attestation.⁵ A failure of recollection by the witness, however, does not have this effect; but the blank may be filled up by secondary evidence.⁶

§ 731. A deceased subscribing witness, however, cannot be impeached by proving his own declarations disparaging the evidence of his signature. In an English case of much interest,⁷ this point was elaborately discussed, and it was finally concluded that to admit such evidence would not merely infringe the rule excluding hearsay, but would expose the most solemn formalities to doubt.

§ 732. A generation, however, cannot be passed without either the death or the disappearance of attesting witnesses; and hence as to an instrument whose alleged execution took place thirty years before it is offered in evidence,

McFerran, 2 S. & R. 44; McAdams v. Stilwell, 13 Penn. St. 90; Burnett v. Thompson, 13 Ired. L. 379.

¹ Wright v. Tatham, 1 A. & E. 21; Cunliffe v. Sefton, 2 East, 183. See Whitelocke v. Musgrove, 1 C. & M. 511; Doe v. Paul, 3 C. & P. 613; Adam v. Kerr, 1 B. & P. 360.

² Supra, §§ 500, 549, 550; Fitzgerald v. Elsee, 2 Camp. 635; Ley v. Ballard, 3 Esp. 173, n.; Thomas v. Le Baron, 8 Mete. 355; Hall v. Phelps, 2 Johns. 451; Ketchum v. Johnson, 3 Green Ch. (N. J.), 370; Patterson v. Tucker, 4 Halst. (N. J.) 322; Duckwall v. Weaver, 2 Ohio, 13; Spencer v. Bedford, 4 Strobb. 96. See New Haven Bk. v. Mitchell, 15 Conn. 206.

³ Bowman v. Bowman, 2 M. & Rob. 501; Parkin v. Moon, 7 C. & P. 409; R. v. Chapman, 8 C. & P. 558.

⁴ Whitaker v. Salisbury, 15 Pick. 534.

⁵ Booker v. Bowles, 2 Blackf. 90.

⁶ Infra, §§ 739, 888; Park v. Mears, 3 Esp. 171; Ley v. Ballard, 3 Esp. 173, n.; Fitzgerald v. Elsee, 2 Camp. 635; Whitaker v. Salisbury, 15 Pick. 534; Hall v. Phelps, 2 Johns. 451; Spencer v. Bedford, 4 Strobb. 96.

⁷ Stobart v. Dryden, 1 M. & W. 615.

the attesting witnesses need not be called.¹ So arbitrary is this rule, that it is applied even where the witness is proved to be living,² and in court,³ though to insure the admission of the document, under such circumstances, it must on its face and in its mode of production be free from suspicion.⁴ It is essential, also, as a condition of such admission, that the document should be produced from the proper custodian.⁵ A deed, also, to be so received must be executed in conformity with the law at the time in force,⁶ and must be by a person having title.⁷

§ 733. It has been frequently held that there must be proof of accompanying possession to enable a deed, over thirty years old, to be read in evidence without proof of execution.⁸ Paying taxes is *prima facie* proof of possession.

attesting
witness
need not
be called.

Accompanying
possession
need not
be proved.

¹ Supra, §§ 194-97-703; *Burling v. Paterson*, 9 C. & P. 570; *Talbot v. Hodson*, 7 Taunt. 251; *R. v. Farrington*, 2 T. R. 471; *McKenire v. Fraser*, 9 Ves. 5; *Vattier v. Hinde*, 7 Pet. 253; *Stoddard v. Chambers*, 2 How. U. S. 284; *Little v. Downing*, 37 N. H. 355; *Pitts v. Temple*, 2 Mass. 538; *Stockbridge v. Stockbridge*, 14 Mass. 256; *King v. Little*, 1 Cush. 436; *Northrop v. Wright*, 24 Wend. 226; *Clark v. Owens*, 18 N. Y. 434; *Urket v. Coryell*, 5 Watts & S. 60; *McReynolds v. Longenberger*, 57 Penn. St. 13; *Bell v. McCawley*, 29 Ga. 355; *Doe v. Roe*, 31 Ga. 593; *Carter v. Chaudron*, 21 Ala. 72; *Burgin v. Chenault*, 9 B. Mon. 285.

² *Ibid.*; *Doe v. Burdett*, 4 A. & E. 19.

³ *Marsh v. Collnett*, 2 Esp. 666. See *Lawry v. Williams*, 13 Me. 281.

⁴ *Roe v. Rawlings*, 7 East, 291; *Doe v. Samples*, 8 A. & E. 151; *Jackson v. Davis*, 5 Cow. 123; *Willson v. Betts*, 4 Denio, 201; *Lau v. Mumma*, 43 Penn. St. 267; *Meath v. Winchester*, 3 Bing. N. C. 200; *Reaume v. Chambers*, 22 Mo. 36; *Fell v. Young*, 63 Ill. 106.

⁵ See supra, §§ 194-7, for authorities to this point.

⁶ *Boyle v. Chambers*, 32 Mo. 46; though see *White v. Hutchings*, 40 Ala. 253.

⁷ *Fell v. Young*, 63 Ill. 106. Supra, § 194.

⁸ 1 Ph. Ev. 276; *Isack v. Clarke*, 1 Roll. 132; *Forbes v. Wale*, 1 W. Bl. 532; *Crane v. Marshall*, 16 Me. 27; *Homer v. Cilley*, 14 N. H. 85; *Clark v. Wood*, 34 N. H. 447; *Bank of Middlebury v. Rutland*, 33 Vt. 411; *Stockbridge v. West Stockbridge*, 14 Mass. 257; *Rust v. Boston Mill Corporation*, 6 Pick. 158; *Green v. Chelsea*, 24 Pick. 71; *Ridgeley v. Johnson*, 11 Barb. 527; *Jackson v. Blanshan*, 3 Johns. R. 292; *Jackson v. Davis*, 5 Cow. 123; *Zeigler v. Houtz*, 1 Watts & S. 533; *Hall v. Gittings*, 2 Har. & J. 380; *Dishazer v. Maitland*, 12 Leigh, 524; *Shanks v. Lancaster*, 5 Grat. 110; *Winston v. Gwathmey*, 8 B. Mon. 19; *Middleton v. Mass*, 2 Nott & M. 55; *Duncan v. Beard*, 2 Nott & M. 400. See, however, *contra*, *McKenire v. Fraser*, 9 Ves. 5; *Barr v. Gratz*, 4 Wheat. 213; *Townsend v. Downer*, 32 Vt. 183; *Lewis*

sion.¹ But this doctrine, as has been already shown,² cannot be sustained on principle; and we must now conclude that for the admissibility of such deeds, proof of contemporaneous possession is unnecessary, though without such proof the deeds may be entitled to little or no weight.³

§ 734. A will, under which possession has been maintained for thirty years, is in like manner admissible,⁴ and in such case, the thirty years have been held not to begin to run until the testator's death.⁵ But a will which has not been proved or recorded, and on which no claim has been made for fifty years, is not admissible without proof.⁶

§ 735. It is still an open question in England whether it is necessary, when there is an attesting witness to the seal of a corporation, to call such witness, or whether the proof of the seal of the corporation is not enough.⁷

§ 736. When, after notice to produce a deed, the adverse party produces it and claims an interest under it, then, as the two parties make the rightful execution of the deed the common postulate of their cases, the subscribing witnesses need not be called.⁸ But this result will not be worked by mere production, without an interest, on the part of the person producing, subsisting at the

v. Laroway, 3 John. Cas. 283; *Hewlett v. Cock*, 7 Wend. 371; *Willson v. Betts*, 4 Denio, 201; *Brown v. Wood*, 6 Rich. Eq. (S. C.) 155; *Wagner v. Aiton*, 1 Rice, 100; *Nixon v. Porter*, 34 Miss. 697.

¹ *Williams v. Hillegas*, 5 Penn. St. 492.

² *Supra*, § 199.

³ *Ibid.* See, also, *infra*, § 1359.

⁴ *Shaller v. Brand*, 6 Binn. 437.

⁵ *Jackson v. Blanshan*, 3 Johns. 292; *Fetherly v. Wagoner*, 11 Wend. 599. See *Doe v. Owen*, 8 C. & P. 751; though see *Doe v. Wolley*, 8 B. & C. 22; 3 C. & P. 702, where it was held that the date of the will was the starting-point; and see *Harris v. Eubanks*, 1 Speers, 183.

⁶ *Meegan v. Boyle*, 19 How. 130.

⁷ *Doe v. Chambers*, 4 A. & E. 410; *S. C.* 6 N. & M. 539; *St. John's Ch. v. Steinmetz*, 18 Penn. St. 273; *Barton v. Wilson*, 9 Rich. (S. C.) 273. As to the practice in respect to seals, see *supra*, § 694.

⁸ *Rearden v. Minter*, 5 M. & Gr. 204; *Orr v. Morice*, 3 B. & B. 139; 6 Moore, 347; *Bradshaw v. Bennett*, 1 M. & R. 143; *Doe v. Wainwright*, 5 A. & E. 520; *Knight v. Martin*, Gow, 26; *McGregor v. Wait*, 10 Gray, 72; *Jackson v. Kingsbury*, 17 Johns. R. 157; *Jackson v. Halstead*, 5 Cow. 216; *Herring v. Rogers*, 30 Ga. 615; *McGee v. Guthry*, 32 Ga. 307; *Williams v. Keyser*, 11 Fla. 234. See *supra*, §§ 152-160, 690.

time of the trial.¹ Nor can an irrelevant paper be by such process introduced.² But where parties claim under a common ancestor, the exception applies.³

§ 737. A party cannot take advantage of his own wrong in withholding a document; and consequently, if a document having attesting witnesses is withheld after due notice, a party desiring to prove such instrument secondarily is relieved from the necessity of calling attesting witnesses.⁴

witnesses need not be called.

When adverse party refuses to produce, attesting witnesses need not be called.

§ 738. A lost or destroyed document may be proved, as is elsewhere fully seen,⁵ by secondary evidence; and to supply such evidence, the attesting witnesses are the proper persons primarily to call. Should their names, however, be lost, or they be out of the reach of process, the document may be proved *aliunde*.⁶ If, however, their names are known, they must be called, and the fact of attestation proved by them.⁷

So as to lost document.

§ 739. It is not generally necessary that an attesting witness should be able to recollect the circumstances attending his signature, or the fact that he saw the maker of the instrument attach to it his name.⁸ It is enough, *primâ facie*, if he swears that the signature is his own, and adds that it would not have been affixed but for the purposes

Sufficient if witness can prove his own signature.

¹ Collins v. Bayntun, 1 Q. B. 117; 8 Pick. 146; Ballard v. Perry, 28 Tex. Doc v. Cleveland, 9 B. & C. 864; 347. See Neely v. Neely, 17 Penn. St. Carr v. Burdiss, 1 C., M. & R. 784; 227. As to adjudications under statute of frauds, see *infra*, §§ 885-9.

² McGee v. Guthry, 32 Ga. 307.

³ Burghart v. Turner, 12 Pick. 534.

⁴ Poole v. Warren, 8 A. & E. 588; Cooke v. Tanswell, 8 Taunt. 450; Davis v. Spooner, 3 Pick. 284. See *supra*, § 157.

⁵ *Supra*, § 142.

⁶ See, as to lost instruments generally, *supra*, § 129 *et seq.*; Grifflith v. Huston, 7 J. J. Marsh. 385.

⁷ See cases cited *supra*, § 142; and as to lost will, see §§ 138-9.

⁸ *Supra*, § 518. Sandilands, in re, L. R. 6 C. P. 411; Maugham v. Hubbard, 8 B. & C. 16; Russell v. Coffin,

The Romans considered it enough if attesting witnesses were able to prove that they were present at and saw the signing. See Nov. 73, 1, 2. It is not necessary, however, that the witness should be able to identify the handwriting as in itself that of the writer; it is sufficient if it be testified that the particular signature was made by the writer in the witness's presence. Subscribing witnesses must testify to the genuineness of their own writing; and such genuineness is *primâ facie* proof of the genuineness of the signature in chief.

of attestation.¹ If he can merely swear to his own signature, other evidence of the genuineness of the instrument may be then received.² Even though he testifies positively that he did not see the parties to the instrument sign, it is enough if he proves that they acknowledged their signatures in his presence;³ or if he proves the delivery of an instrument already signed and sealed, to which his signature as a witness is attached.⁴

§ 739 *a*. A *primâ facie* case of identification of the person executing the document is necessary;⁵ but such identification need not be by the attesting witnesses, but may be *aliunde*.⁶ The proof of identity, however, need be only inferential; and the fact that the names are the same may, unless there be grounds of suspicion, ordinarily supply the inference.⁷ Delivery can be inferred from proof of signature by the attesting witness, though the witness has no recollection of anything but seeing the signature of the parties.⁸

§ 740. Wherever a statute authorizes the acknowledging of an instrument, providing at the same time that such instrument shall be admissible in evidence on proof of its acknowledgment, then, if the conditions required by the statute as prerequisites of the acknowledging appear from the record to have been observed, such instrument is admissible as *primâ facie* proof. It is not necessary in such case to call the attesting witness; but the instrument may be put in evidence, after the acknowledgment required by the statutes, either by force of the statutes, or

When statute makes acknowledged instrument evidence, it is not necessary to call attesting witness.

¹ *Burling v. Paterson*, 9 C. & P. 570; *Hemphill v. Dixon*, 1 Hempt. 235; *Alvord v. Collin*, 20 Pick. 418; *New Haven Bk. v. Mitchell*, 15 Conn. 206; *Hall v. Luther*, 13 Wend. 491; *Bennett v. Fulmer*, 49 Penn. St. 155; *Pearson v. Wightman*, 1 Mill S. C. 336; *Gwinn v. Radford*, 2 Litt. (Ky.) 137.

² *Crabtree v. Clark*, 20 Me. 337; *Curtis v. Hall*, 1 South. (N. J.) 361.

³ *Munns v. Dupont*, 3 Wash. C. C. 32; *Hollenback v. Fleming*, 6 Hill (N. Y.), 303; *Hale v. Stone*, 14 Ala. 803. As to rule under statute of frauds, see *infra*, §§ 885-9.

⁴ *Higgins v. Bogan*, 4 Harr. (Del.) 330. See *Harden v. Hays*, 14 Penn. St. 91; *Allen v. Holden*, 32 Ga. 418; *Lazarus v. Lewis*, 5 Ala. 457.

⁵ *Brown v. Kimball*, 25 Wend. 260; *Russell v. Tunno*, 11 Rich. (S. C.) 303. For other cases see *supra*, § 701.

⁶ *Goodhue v. Berrien*, 2 Sanf. Ch. 630; *Hamsher v. Kline*, 57 Penn. St. 397; *Moss v. Anderson*, 7 Mo. 337; *Crockett v. Campbell*, 2 Humph. 411. *Infra*, § 1273.

⁷ *Supra*, § 701, and cases cited *infra*, § 1273.

⁸ *Burling v. Paterson*, 9 C. & P. 570. *Infra*, § 1313.

at common law, by proving the execution.¹ The record, however, must be in the proper court.² And mere registration does not entitle a deed to be read in evidence, without an express statutory provision to that effect.³ The acknowledgment must be in due form, as prescribed by local law.⁴ Thus where the local law

¹ Supra, § 118. *Houghton v. Jones*, 1 Wall. 702; *Younge v. Guilbeau*, 3 Wall. 636; *Edmondson v. Lovell*, 1 Cranch C. C. 103; *Dubois v. Newman*, 4 Wash. C. C. 74; *Fellows v. Pedrick*, 4 Wash. C. C. 477; *Webster v. Calden*, 55 Me. 171; *Bellows v. Copp*, 20 N. H. 492; *Eaton v. Campbell*, 7 Pick. 12; *Com. v. Emery*, 2 Gray, 80; *Samuels v. Borrowscale*, 104 Mass. 207; *Morris v. Wordsworth*, 17 Wend. 103; *People v. Denison*, 17 Wend. 312; *Sheldon v. Stryker*, 42 Barb. 284; *Shortz v. Unangst*, 3 Watts & S. 45; *Jordan v. Stewart*, 23 Penn. St. 244; *Duffey v. Congregation*, 48 Penn. St. 46; *Doe v. Prettyman*, 1 Houst. 339; *Ayres v. Grimes*, 3 Har. & J. 95; *Hutchison v. Rust*, 2 Grat. 394; *Fisher v. Butcher*, 19 Ohio, 406; *Doe v. Johnson*, 3 Ill. 522; *Holbrook v. Nichol*, 36 Ill. 161; *Sharp v. Wickliffe*, 3 Litt. 10; *Beil v. McCawley*, 29 Ga. 355; *Doe v. Roe*, 36 Ga. 463; *Toulmin v. Austin*, 5 St. & P. 410; *Eastland v. Jordan*, 3 Bibb, 186; *Clark v. Troy*, 20 Cal. 219; *Simpson v. Munde*, 3 Kans. 181; *Smith v. Hughes*, 23 Tex. 248; *Page v. Arnim*, 29 Tex. 53. See 3 Washb. on Real Prop. 522.

The New York statute (2 Fay's Stat. 14) provides that "every written instrument, except promissory notes and bills of exchange, and except the last wills of deceased persons, may be proved or acknowledged in the manner now provided by law; and the certificate of the proper officer indorsed thereon shall entitle such instrument to be received in evidence, with the same effect and in the same

manner as if such instrument were a conveyance of real estate."

Under this statute we have the following: "The defendant also claimed that it was irregular to prove the transfer of the stock by Riggs by means of an acknowledgment made by the subscribing witness before a notary, such acknowledgment being made long after the power of attorney is assumed to have been executed by Riggs, and shortly before it was offered in evidence. There is nothing in this objection. The Laws of 1833, c. 271, § 9, provide that 'every written instrument, except promissory notes, bills of exchange, and the last wills of deceased persons, may be proved or acknowledged in the manner now provided by law for taking the proof or acknowledgment of conveyances of real estate. The certificate thus taken is to be used in evidence in the same manner and with the same effect as if the instrument were a conveyance of real estate.' There can be no doubt that the power of attorney is a 'written instrument,' and falls within the statute, and the acknowledgment may be made at any time before the paper is offered in evidence." *Dwight, C., Holbrook v. New Jersey Zinc Co.* 57 N. Y. 624.

² *Secrest v. Jones*, 21 Tex. 121.

³ *Williams v. Griffin*, 4 Jones (N. C.) L. 31; *Payne v. McKinney*, 30 Ga. 83; *Robertson v. Kennedy*, 1 Stew. (Ala.) 245; *Brook v. Headen*, 13 Ala. 370; and see cases cited supra, § 115.

⁴ *Wood v. Weiant*, 1 Comst. (N. Y.) 77; *Campbell v. Hoyt*, 23 Barb.

requires a certificate from the officer that he personally knew the subscribing witness, a deed cannot be admitted without such certificate.¹ The fact that the acknowledgment of a deed was after suit brought does not preclude the admission of the deed.² It is scarcely necessary to add, that the statutes authorizing the admission of such instruments as recorded do not exclude them if unrecorded.³ *A fortiori* the original in no sense loses its evidential power by being recorded.⁴ That a party having an exemplification of a recorded deed cannot put such copy in evidence, unless the original deed is out of his power, we have already seen.⁵

§ 741. In England it seems to be doubted whether such deeds are admissible, without proving attestation, against any one except the party on whose acknowledgment the deed is recorded.⁶ In this country, in absence of an enabling statute, acknowledgment of an instrument before the proper officer does not supersede the necessity of proving its execution in order to put it in evidence.⁷ But where there is an enabling statute, the certificate of the proper officer, before whom an acknowledgment and the accompanying attestation are taken, has been held *prima facie* evidence of the facts set forth in such acknowledgment and attestation.⁸ The extent to which the acknowledgment can be disputed will be hereafter discussed.⁹

555; *Anderson v. Turner*, 2 Litt. (Ky.) 237; *Eastland v. Jordan*, 3 Bibb, 186; *Johnson v. Fowler*, 4 Bibb, 521; *Andrews v. Marshall*, 26 Tex. 212; *Gaine v. Ann*, 26 Tex. 340. As to disputing the acknowledgment by parol proof, see *infra*, § 1052.

¹ *Morgan v. Curtenius*, 4 McL. 366; *Job v. Tebbetts*, 9 Ill. 143; *Bone v. Greenlee*, 1 Coldw. 29. See *Johnston v. Ewing*, 35 Ill. 518; *Sheldon v. Stryker*, 42 Barb. 284.

² *Lanning v. Dolph*, 4 Wash. C. C. 624.

³ *Bucksport v. Spofford*, 12 Me. 487; *Morris v. Vanderen*, 1 Dall. 64; *Young v. Com.* 6 Binn. 88.

⁴ *U. S. v. Laub*, 12 Pet. 1; *Vose*

v. Manly, 19 Me. 331; *Day v. Moore*, 13 Gray, 522; *Miller v. Hale*, 26 Penn. St. 432; *Sheehan v. Davis*, 17 Oh. St. 571; *Dobbs v. Justice*, 17 Ga. 624.

⁵ See *supra*, § 115.

⁶ *Buller's Nisi Prius*, 255. See *Taylor's Ev.* § 1651.

⁷ *Mullis v. Cavins*, 5 Blackf. 77; *Raviesies v. Alston*, 5 Ala. 297; *Catlin v. Ware*, 9 Mass. 218; *Eichelberger v. Sifford*, 27 Md. 320; *Kidd v. Alexander*, 1 Rand. (Va.) 456.

⁸ See cases cited *infra*, § 1052; *Doe v. Lloyd*, 1 M. & Gr. 684; *Jackson v. Schoonmaker*, 4 Johns. R. 161; *People v. Hurlbutt*, 44 Barb. 126; *Thurman v. Cameron*, 24 Wend. 87; *Ste-*

⁹ *Infra*, § 1052.

XII. INSPECTION OF DOCUMENTS BY ORDER OF COURT.

§ 742. Independently of the right to inspection based on the old doctrine of *profert et oyer*,¹ a party is entitled, in view of litigation, to a rule for inspection of such documents in the hands of the opposite party, as are essential to the maintenance of contested rights.² Inspection will also be granted where a party is desirous of seeing and copying a document in his opponent's hands, for the purpose of bringing suit on the same.³ To grant the order it is not necessary that the document be in the hands of the party against whom the order is asked. It is enough if the document is in the hands of his agent, or in some way subject to his authority.⁴

Rule granted to compel production of papers.

vens v. Martin, 18 Penn. St. 101; *Keichline v. Keichline*, 54 Penn. St. 75; *Williams v. Baker*, 71 Penn. St. 482; *Duff v. Wynkoop*, 74 Penn. St. 300; *Heeter v. Glasgow*, 79 Penn. St. 79; *Middleton v. Dubuque*, 19 Iowa, 467; *Johnson v. Pendergrass*, 4 Jones (N. C.) L. 479; *Bledsoe v. Wiley*, 7 *Humph.* 507.

In *Doe v. Lloyd*, 1 M. & Gr. 671, 684, a deed, requiring enrolment under the mortmain act was produced at the trial, and bore the following indorsement: "Enrolled in the high court of chancery, the 17th of December, 1836, being first duly stamped according to the tenor of the statutes made for that purpose. D. Drew." It was held that, without proving the signature or the official character of Mr. Drew, the memorandum was evidence that the deed was enrolled on the day stated, *it having been certified to the court*, by an officer of the enrolment office, that the memorandum was in the usual form. See, also, to same effect, *Kinnersley v. Orpe*, 1 Doug. 58, per Buller, J., recognized in *Doe v. Lloyd*, 1 M. & Gr. 685; *Compton v. Chandless*, 4 Esp. 19, per Ld. Kenyon.

¹ See *infra*, § 753.

² *Arundel v. Holmes*, 8 Dowl. 119; *Rayner v. Ritson*, 6 B. & S. 888; *King v. King*, 4 Taunt. 666; *Browning v. Aylwin*, 7 B. & C. 204; *Woolmer v. Devereux*, 2 M. & Gr. 758; *Morrow v. Saunders*, 1 B. & B. 318; *Price v. Harrison*, 8 C. B. N. S. 617.

As to practice under federal statute, see *Iasigi v. Brown*, 1 *Curtis C. C.* 401.

As to New York practice, see *Hauseman v. Sterling*, 61 Barb. 347; and see, also, *Jackson v. Jones*, 3 Cow. 17; *Utica Bank v. Hillard*, 6 Cow. 62; *Gould v. McCarthy*, 11 N. Y. 575; *Davis v. Dunham*, 13 *How. Pr.* 425.

Under the Code, this remedy is co-extensive with that by bill of discovery. *Lefferts v. Brampton*, 24 *How. Pr.* 257.

³ *Rowe v. Howden*, 4 Bing. 539, n.; *Blakey v. Porter*, 1 Taunt. 386; *Arundel v. Holmes*, 8 Dowl. 119; *Miller v. Mather*, 5 *How.* 160; *Reid v. Coleman*, 2 C. & M. 456; *Powers v. El-mendorff*, 4 *How. Pr.* 60.

⁴ *Morrow v. Sanders*, 3 Moore, 671; *Gigner v. Bayly*, 5 Moore, 71; *Steadman v. Arden*, 4 Dowl. & L. 16; 15 M. & W. 587; *Ley v. Barlow*, 1 *Ex. R.* 800.

The mere fact that letters are written to the plaintiff's solicitor "in confidence," and under a pledge not to disclose their contents to any one but the plaintiff and his legal advisers, affords no defence to an application for an order to inspect them. But if they are not merely confidential communications, but are written in answer to inquiries by the plaintiff's solicitor with a view to and in contemplation of anticipated litigation, they are privileged.¹

§ 743. To sustain such a rule the following conditions must exist: *First*, the party applying must make an affidavit to the effect that he has no copy in his hands or attainable by himself;² though under peculiar circumstances the court may at its discretion dispense with such affidavit;³ *secondly*, the applicant must have a legal or equitable interest in the document;⁴ *thirdly*, it must appear that the paper is in the hands of the holder as in some sense the trustee of the applicant; or the application will be refused.⁵

§ 744. Where these conditions exist, the court (or a judge at chambers) may compel the production, not merely of documents

¹ *McCorquodale v. Bell*, L. R. 1 C. P. D. 471; *Cossey v. London, Brighton & South Coast Railway Co.* L. R. 5 C. P. 146; and *Skinner v. Great Northern Railway Co.* Law Rep. 9 Ex. 298, followed; *Fenner v. London & Southeastern Railway Co.* Law Rep. 7 Q. B. 767, observed upon and explained. *Infra*, §§ 579, 585-7.

² When the object is to obtain access to a paper relied on by the opposite side, the usual practice is, for the party to make affidavit to some defence attacking the genuineness of the instrument; *Woolmer v. Devereux*, 2 M. & Gr. 758; *Birming. R. R. v. White*, 1 Q. B. 286; though in some cases the application will be granted, even without an affidavit, wherever there was no reason to suspect that the application was not to enable the party to set up a frivolous or merely technical defence. *Ibid.*; *S. C.* under name of *Woolner v. Devereux*, 9

Dowl. 672; *Beal v. Bird*, 2 D. & R. 419.

This right has been held to exist in reference to negotiable paper, to policies of insurance; *Goldsmidt v. Marryat*, 1 Camp. 562; *Rayner v. Ritson*, 6 B. & S. 888; and to informal written agreements. *Price v. Harrison*, 8 C. B. N. S. 617.

³ *Ibid.*; *Portmore v. Goring*, 4 Bing. 152; 12 Moore, 363; *Morrow v. Saunders*, 1 B. & B. 318; *Bluck v. Gompertz*, 7 Ex. R. 67.

⁴ *Lawrence v. Hooker*, 5 Bing. 6; *Cocks v. Nash*, 9 Bing. 723; *Smith v. Winter*, 3 M. & W. 309; *Goodliff v. Fuller*, 14 M. & W. 4; *Powell v. Bradbury*, 4 C. B. 541; *Pritchett v. Smart*, 7 C. B. 625; *Partridge, ex parte*, 1 Har. & W. 350.

⁵ *Pickering v. Noyes*, 1 B. & C. 262; *Blogg v. Kent*, 6 Bing. 615. See *Parkhurst v. Gosden*, 2 C. B. 894.

on which suit is brought, but of evidentiary writings (*e. g.* letters written by the defendant which the plaintiff could use as indicative of a contract), which had been lodged by both parties in the hands of a third person as trustee, and which the applicant might find important to his case.¹ It should be added that in England, since Lord Brougham's Evidence Act of 1851, a party is entitled on application to inspect all documents in the custody of the opposite party, relevant to any pending litigation, and to take examined copies of the same, in all cases on which a bill of discovery would lie for the production of such papers.

§ 745. In England, the queen's bench will enforce by mandamus the production for inspection of any document of a public nature in which a party may be interested.² So as to public documents. An applicant, however, to entitle him to the rule, must show that he has an interest in the documents sought to be inspected, and that the application is for a legitimate purpose.³ If the application be merely to gratify curiosity, or to discover a flaw for contingent litigation, the rule, in England, will not be granted.⁴ In the United States, however, so far as concerns our judicial records, and our registries of wills and deeds, no such distinction exists; as by statute, or usage settled in default of statute, the officers having custody of such documents are required to exhibit them, and to give copies of them on the payment of the proper fee. In cases where no such right is established, a party may, in a proper case, obtain inspection, at common law, by a writ of mandamus issued out of a supreme court, in all cases where an inspection of a public document is necessary to enable the applicant to obtain justice. But a mandamus will not be granted unless the documents desired lie at the basis of the complainant's suit.⁵ Nor will a court compel a disclosure of documents which state policy requires to be kept secret.⁶

¹ Price v. Harrison, 8 C. B. N. S. 617; Stone v. Strange, 3 H. & C. 541; Pape v. Lister, L. R. 6 Q. B. 242; Reid v. Coleman, 2 C. & M. 456; Owen v. Nickson, 3 E. & E. 602; Steadman v. Arden, 4 D. & L. 16; 15 M. & W. 587; Exchange Bk. v. Monteath, 4 How. Pr. 280; Pindar v. Seaman, 33 Barb. 140; Hoyt v. Ex.

Bank, 1 Duer, 652; S. C. 8 How. 89.

² R. v. Staffordshire, 6 A. & E. 99, 100.

³ Ex parte Briggs, 1 E. & E. 881.

⁴ R. v. Staffordshire, *ut supra*.

⁵ Atherfold v. Beard, 2 T. R. 610.

⁶ *Supra*, §§ 604-5.

§ 746. The books and papers of a corporation, though not open to strangers,¹ may upon order of court be produced for the inspection of corporators,² provided it be shown that such inspection is necessary to a suit then instituted, or at least to some specific dispute or question depending, in which the applicant is interested.³ Although a wider jurisdiction is intimated by some of the earlier cases,⁴ it is now settled in England that the remedy is confined to cases where the inspection is necessary to the adjudication of a particular issue.⁵ Thus the application was refused in a case where members of a corporation asked to inspect all the documents of the corporation, alleging that its affairs were improperly conducted, and complaining of misgovernment in some particulars not affecting themselves, nor then in dispute;⁶ nor, when a stockholder is sued by a company for calls, will he be granted a rule to inspect the minute-books of the company and of the meetings of the directors, "particularly with respect to the calls," when his object is to fish out a defence.⁷ A person not being a member of the college of physicians, not having a license, cannot avail himself of this right in order to obtain the inspection of the books of the college.⁸

¹ *Bolton v. Liverpool*, 3 Sim. 467; 1 Myl. & K. 88.

² *R. v. Shelley*, 3 T. R. 145; *R. v. Lucas*, 10 East, 235; *R. v. Travanton*, 2 Chitty, 366, n.; *Am. R. R. Co. v. Haven*, 101 Mass. 398; *People v. Throop*, 12 Wend. 183; *Bank of Utica v. Hillard*, 6 Cow. 62; *Maddox v. Graham*, 2 Met. (Ky.) 56; *Cockburn v. Union Bk.* 13 La. An. 289; *Angell & Ames on Corp.* (10th ed.) 707; 4 *Wait's Practice*, 205.

³ *R. v. Merchant Tailors' Co.* 2 B. & Ad. 115; *In re Burton and the Saddlers' Co.* 31 L. J. Q. B. 62.

⁴ *R. v. Hostmen of Newcastle*, 2 Str. 1223; *R. v. Babb*, 3 T. R. 581, per Ashurst, J.

⁵ *R. v. Merchant Tailors' Co.* 2 B. & Ad. 115.

⁶ *R. v. Merchant Tailors' Co.* 2 B. & Ad. 115.

⁷ *Birming., Brist. & Thames Junc. Ry. Co. v. White*, 1 Q. B. 282. See *Imperial Gas Co. v. Clarke*, 7 Bing. 95; and see *Powers v. Elmendorff*, 4 How. 60; *S. C.* 2 Code R. 44; *Johnson v. Consol. Silver Co.* 2 Abb. (N. S.) 413; *Hoyt v. Exch. Co.* 1 Duer, 652; *S. C.* 8 How. 89.

⁸ A prebendary, so it has been ruled in England, is entitled at all times to inspect the documents of the chapter. *Young v. Lynch*, 1 W. Bl. 27.

A bishop, also, holds his register of presentations and institution open to a mandamus, at the petition of a person claiming title to a living in the diocese. *R. v. Bishop of Ely*, 8 B. & C. 112; *S. C.* under name of Bp. of Ely, 2 M. & R. 127.

§ 747. Whenever a document, in the hands of a public administrative officer, is requisite to enable a party to obtain his rights in a court of justice, a mandamus, or, in ordinary practice, a rule of court, will be granted to compel an exhibition of such document for inspection.

So as to public administrative officers.

When the act is merely ministerial, involving no executive discretion, then it may be compelled by mandamus.¹ Custom-house officers may be compelled in this way to exhibit their books to merchants interested in the entries,² and so may other officers or custodians of papers where the inspection is necessary to establish some disputed claim.³ The applicant for the order, however, in order to obtain relief, must have an interest in the documents, or must seek to inspect them for some public object connected with the purposes for which the books are kept.⁴

§ 748. It has consequently been held in England that fundholders are entitled to inspect and take copies of the deposit and transfer books of the bank of England,⁵ or of the East India Company, which relate to stock in which they claim to be interested.⁶ The same rule is applicable to all private corporations.⁷

So as to deposit and transfer books.

§ 749. When private writings are produced for inspection, under an order of court, the court will not, in any case, compel the impounding of papers, or their deposit with an officer of the court or any third party. The owner of the document is allowed to keep it in possession. The order simply permits its inspection, while in the hands of the owner, or his attorney, by the opposing party, or by witnesses.⁸

Inspection ordered, not surrender.

¹ Goodell, *ex parte*, 14 Johns. 325; *People v. Bell*, 38 N. Y. 386; *Cotten v. Ellis*, 7 Jones L. (N. C.) 545; *Pacific R. R. v. Governor*, 23 Mo. 353.

² *Crew v. Saunders*, 2 Str. 1005.

³ See note by Mr. Nolan to *R. v. Hostmen of Newcastle*, 2 Str. 1223. See, also, *R. v. King*, 2 T. R. 235, per Ashurst, J., as to the assessments of the land tax.

⁴ *Crew v. Saunders*, 2 Str. 1005. See *Atherfold v. Beard*, 2 T. R. 610.

⁵ *Foster v. Bk. of England*, 8 Q. B. 689.

⁶ *Geery v. Hopkins*, 2 Ld. Raym. 851; 7 Mod. 129, S. C.; *Taylor's Evidence*, § 1350.

⁷ See *Hoyt v. Exch. Co.* 1 Duer, 652; S. C. 8 How. Pr. 89; *Johnson v. Consol. Silver Co.* 2 Abb. (N. S.) 413.

⁸ *Thomas v. Dunn*, 6 M. & Gr. 274; *Rogers v. Turner*, 21 L. J. Exch. 9. *Infra*, § 752.

"At common law, and independently of recent statutes, courts of law had the power to order inspection of papers, which, by the pleadings, or by being used in evidence,

§ 750. As a matter of practice, an order to produce for inspection is regarded as a last resort, and will not usually be granted,¹ unless it appear by affidavit that a demand to inspect has been made to the custodian, and inspection has been denied.² The objection, however, that the affidavit exhibits no such demand, must be taken before the merits are discussed.³ The application may be made on a verified petition,⁴ as well as by motion backed by affidavits.⁵ The affidavit may be by any person cognizant of the facts.⁶

came within the control of the court. When any deed is showed in court, the deed, by judgment of law, doth remain in court all the term at which it is showed, for the whole term is as one day, and the party may demand oyer during the time it is so in court. *Wymark's case*, 5 Rep. 148; *Simpson v. Garside*, 2 Lutwyche, 1641. A new trial having been granted, the court allowed the plaintiff inspection of a deed read in evidence by the defendant at the first trial, but denied it as to another deed, the execution of which was admitted at the former trial, but which was not offered in evidence. *Hewitt v. Pigott*, 7 Bing. 400.

"But the court, in exercising this control over papers and documents offered in evidence, will merely grant inspection and examination by the party and his witnesses, either in open court or before an officer of the court, or in the presence of the party producing them, or his attorney, and will not take them from the latter and deliver them into the possession of the other side. 2 Taylor on Evidence, § 1593; *Thomas v. Dunn*, 6 M. & Gr. 274." *Depue, J., Hilyard v. Harrison*, 37 N. J. 173.

¹ 2 Wait's Practice, 553; Taylor's Evidence, § 1353.

² *R. v. Wilts. & Berks. Can. Co.* 3 A. & E. 477; 5 Nev. & M. 344, S. C.;

R. v. Bristol & Exeter Ry. Co. 4 Q. B. 162.

³ 4 Q. B. 171, per Ld. Denman, recognizing *R. v. East Cos. Ry. Co.* 10 A. & E. 531, 545, n. b.

As to the nature of the refusal, see *R. v. Brecknock & Aberg. Can. Co.* 3 A. & E. 222, 223, per Ld. Denman and Littledale, J.

Where a shareholder applied to the committee for leave to inspect the books of the company, and was told by the chairman that the committee would take time to consider the request, whereupon, ten days afterwards, he again applied to the clerk, who refused inspection, though it did not appear that the refusal had been authorized by the committee; the court of the queen's bench held that no sufficient refusal by the committee had been proved, to warrant the making absolute a rule for a mandamus." *R. v. Wilts. & Berks. Can. Co.* 3 A. & E. 477; 5 Nev. & M. 344, S. C.; See *Birm. R. R. v. White*, 1 Q. B. 282; *R. v. Trustees*, 5 B. & Ad. 778.

⁴ *Dole v. Fellows*, 5 How. Pr. 451.

⁵ *Exch. Bank v. Monteath*, 4 How. Pr. 280; *Johnson v. Consol. Silver Co.* 2 Abb. N. S. 413; *Pindar v. Seaman*, 33 Barb. 140.

⁶ *Exchange Bank v. Monteath*, 4 How. Pr. 280.

§ 751. What is elsewhere said as to the protection of witnesses from questions which call for criminatory answers, applies to the production of criminatory documents. Neither equity nor common law practice will compel a person to allow the inspection of either public or private documents in his custody, where the document, if produced, would criminate the party producing.¹ The risk, however, to which the custodian is exposed, must be that of a real, and not that of a nominally penal prosecution.² Neither a *quo warranto*,³ nor a mandamus,⁴ is a criminal proceeding in the above sense. At the same time, inspection will be ordered when the applicant has reason to believe that the document in question was forged; and the court, on a proper case, will impound the document for the purposes of a criminal prosecution.⁵

Production of criminatory documents will not be compelled.

§ 752. It may be necessary, in order to determine as to the meaning or genuineness of a writing, that it should be examined by others than the applicant, or his attorney. Hence, on due cause shown, the court will authorize an inspection by other persons, as for instance, the plaintiff's land agent, even though he be himself a witness in the suit.⁶ In cases where genuineness is contested, the court may order the contested documents to be exhibited to experts in writing.⁷

Documents may be examined by interpreters and experts.

§ 753. We have already noticed the principles on which rules to produce documents for inspection are granted in the present practice. It may still not be out of place to observe that, under the old system of pleading, a party

Deed when pleaded can be inspected.

¹ *R. v. Purnell*, 1 W. Bl. 37; 1 Wils. 239, *S. C.*; *R. v. Heydon*, 1 W. Bl. 351; *R. v. Buckingham Js.* 8 B. & C. 375; *R. v. Cornelius*, 2 Str. 1210; 1 Wils. 142, *S. C.*; *Wigr. Disc.* § 130; *Montague v. Dudman*, 2 Ves. Sen. 397; *Glynn v. Houston*, 1 Keen, 329; *Taylor's Ev.* § 1351; *Byass v. Sullivan*, 21 How. (N. Y.) Pr. 50. See *Bradshaw v. Murphy*, 7 C. & P. 612. *Supra*, §§ 533-5.

² *R. v. Cadogan*, 5 B. & A. 902; 1 D. & R. 550.

³ *R. v. Shelley*, 3 T. R. 141; *R. v. Purnell*, 1 W. Bl. 45.

⁴ *R. v. Ambergate*, 17 Q. B. 957.

⁵ *Thomas v. Dunn*, 6 M. & Gr. 274; *Woolmer v. Devereux*, 2 M. & Gr. 758; *S. C.* 3 Scott, N. R. 224; *Richey v. Ellis*, Ale. & Nap. 111; *Rogers v. Turner*, 21 L. J. Ex. 9; *Boyd v. Petrie*, L. R. 3 Ch. Ap. 818, overruling *S. C.* L. R. 5 Eq. 290.

⁶ *Att. Gen. v. Whitwood Local Board*, 40 L. J. Ch. 590.

⁷ *Swansea Vale R. R. v. Budd*, L. R. 2 Eq. 274; *Boyd v. Petrie*, L. R. 3 Ch. Ap. 818, qualifying *S. C.* L. R. 5 Eq. 290.

making either title or defence under a deed was bound, unless the deed was lost or in some other way out of his power, to make *profert* of it; in other words, tender it for inspection. The opposing party could then crave oyer of the deed; and in answer to this prayer, the deed was either formally or constructively brought into court,¹ and was set out on the records at full. The process, however, was not only narrow in its application, but clumsy in its operation. In England it was abolished in the Common Law Procedure Act of 1852; and in this country, in some states, was never adopted, in others, has been superseded. But even where the process is abolished, the right it secures remains. Wherever a party refers in his pleading to a sealed instrument, as the basis of his claim, the opposing party may obtain, by order of court, the inspection of the instrument.² This right has always been regarded as essential to justice, and the courts have been ready to exercise it irrespective of the question of a seal. The practice is for a party desiring to inspect an instrument relied on by the other side, to apply either to the court, or to a judge at chambers, for an order for the production of the writing.³

§ 754. Provisions analogous to those contained in the statutes just noticed have been enacted in most of the states of the American Union; and where such provisions are not in force, it has not been unusual for common law courts, vested with chancery jurisdiction, to adopt the practice of requiring parties to answer on interrogatories, prior to the trial, such questions as to papers as would be proper in a bill of discovery. The question then arises, what relief would a bill of discovery, in such cases, give; for the relief which would be given in chancery is that which, under ordinary circumstances, would be given, under the new practice, by courts of common law. We may begin by saying, (1.) that a court will not compel a party to disclose immaterial papers, nor papers which relate exclusively

Inspection
may be
secured by
bill of
discovery.

¹ Stephen's Pleading, pl. 482-6; *v. Ellames*, 2 Myl. & K. 732; *Macintosh v. Scott*, 2 M. & W. 816; *tosh v. R. R.* 14 M. & W. 548; 1 Hall Archp. of Cant. *v. Tubb*, 3 Bing. N. C. 789; *Hillyard v. Harrison*, 37 N. J. 173. See Taylor's Ev. § 1586.

² *Penarth R. R. v. Cardiff Water-works*, 7 C. B. N. S. 816; *Hardman*

³ *Woolmer v. Devereux*, 2 M. & Gr. 758; *Thomas v. Dunn*, 6 M. & Gr. 274.

to the case of the holder of the papers, and which in no sense go to make up the case of the complainant, either as showing right in himself or disproving right in his opponent.¹ Nor (2.) will a disclosure in violation of the rules of professional privilege be in any case compelled.² Nor (3.) will a disclosure be compelled, unless it appear from the answer that the papers are in the defendant's possession or power.³ Nor (4.) will officers of the government be in this way compelled to disclose confidential documents, whose publication would be prejudicial to the public interests.⁴ Nor (5.) will a party be in this way compelled to exhibit papers which will subject him to criminal prosecutions or forfeitures,⁵ though he cannot by this excuse avoid producing papers which might simply expose him to a suit for fraud.⁶

§ 755. With the qualifications just stated, a party to a suit at common law, whether he be plaintiff or defendant, can compel, in equity, the disclosure of any papers tending either to sustain his own case,⁷ or to damage the case of his opponent.⁸ It should be kept in mind that in all cases the *onus* is on the applicant to prove his right to the relief sought,⁹ and that he is ordinarily bound by the defendant's answer or affidavits as to the relevancy of the

¹ *Smith v. Beaufort*, 1 Hare, 520; *v. Dudman*, 2 Ves. Sen. 397; *Macaulay v. Shackell*, 1 Bligh N. S. 126.
S. C. 1 Phill. 220; *Bolton v. Liverpool*, 1 Myl. & K. 88; *S. C.* 3 Sim. 467; *Inglby v. Shafto*, 33 Beav. 31; *Wright v. Vernon*, 1 Drew. 344; *Peile v. Stoddart*, 1 Hall & T. 207; *Hambrook v. Smith*, 17 Sim. 209; *Kettlewell v. Barstow*, L. R. 7 Ch. App. 686; *Brown v. Wales*, L. R. 15 Eq. 142.

² *Supra*, § 585. *Wigram*, Disc. §§ 26, 284; *Minet v. Morgan*, L. R. 8 Ch. Ap. 361; *Wilson v. R. R. L. R.* 14 Eq. 477; *McCorquodale v. Bell*, L. R. 1 C. P. D. 471. *Supra*, § 742.

³ *Wigram*, Disc. § 294; *Burbridge v. Robinson*, 2 M. & Gord. 244; *Reynell v. Sprye*, 1 De Gex, M. & G. 656.

⁴ *Rajah of Coorg v. E. I. Co.* 30 L. J. Ch. 226; *Marbury v. Madison*, 1 Cranch, 144. *Supra*, § 604.

⁵ *Wigr. Disc.* §§ 127-147; *Montague*

⁶ *Bispham's Eq.* § 502; *Lee v. Read*, 5 Beav. 381; *Reynell v. Sprye*, 10 Beav. 51; *Skinner v. Judson*, 8 Con. 528; *Howell v. Ashmore*, 1 Stockt. (N. J.) 82.

⁷ *Earp v. Lloyd*, 3 Kay & J. 549; *Jenkins v. Bashby*, L. R. 2 Eq. 547; *Atty. Gen. v. Lambe*, 3 Y. & C. Ex. 162; *Atty. Gen. v. Thompson*, 8 Hare, 106.

⁸ *Stainton v. Chadwick*, 3 M. & Gord. 575; 13 Beav. 320; *Atty. Gen. v. London*, 2 Hall & T. 1; 2 M. & Gord. 247; *Thompson v. R. R.* 9 Abb. (N. Y.) Pr. N. S. 212, 230. See *Eric R. R. v. Heath*, 8 Blatch. 413; *Cent. Bk. v. White*, 37 N. Y. Sup. Ct. 297; *Whitworth v. R. R.* 37 N. Y. Sup. Ct. 437; *Dambman v. Butterfield*, 4 Thomp. & C. 542.

⁹ *Wigr. Disc.* § 293.

papers, and their custody.¹ It has, however, been held that where the defendant incorporates the contested documents (which he admits to be in his possession) in his answer, so as to make them form a substantial part of it, the plaintiff, in such case, will be held to be entitled to inspect the documents; because the defendant, by exhibiting them, has waived the right to withhold them. Nor does he retain his right by claiming, in a subsequent part of his answer, the privilege of withholding them, either as forming no part of his opponent's case, or as confidential communications.²

§ 756. A respondent cannot excuse himself from producing

Papers not under respondent's control he will not be compelled to produce.

papers in the hands of his agent or of any person under his control. Such papers, if required, must be produced.³ On the other hand, it is not the usual practice to order the production of papers, where it appears by the defendant's answer that he has a *joint* possession of

¹ See Wigr. Disc. § 293; *Morrice v. Swaby*, 2 Beav. 500; *Gardner v. Dangerfield*, 5 Beav. 389. See *Lamb v. Orton*, 22 L. J. Ch. 713; *Luscombe v. Steer*, 37 L. J. Ch. 119.

² *Hardman v. Ellames*, 2 Myl. & K. 732; *Macintosh v. R. R.* 1 M. & Gord. 73; 1 Hall & T. 41.

The English practice on such a bill is thus stated (Wigram's Disc. § 285): "The plaintiff alleges in his bill (in effect) that the defendant has in his possession, or power, deeds, papers, and writings relating to matters mentioned in the bill; and that, by the contents of such deeds, papers, and writings, if the same were produced, the truth of the plaintiff's case would appear. The defendant is then required by the bill to admit or deny the truth of these allegations; if he admits having possession, or power, over any such deeds, documents, and writings, he is required by the bill, and is *primâ facie* bound to describe them, either in the body of the answer or in the schedule of it. The plaintiff then moves the court that the defendant may be ordered to produce

or leave in the Record and Writ Office (Gen. Ord. 57, 16th Oct. 1852), 'the deeds, papers, and writings so described, with liberty for the plaintiff to inspect them and take copies thereof.' Though this mode of proceeding has of late years been substituted for the more cumbersome course of requiring the defendant to set out the contents of the documents in his answer, the orders for production still rest upon the principle that the documents are *part* of the defendant's compulsory *examination*; and consequently, at the trial at law, the plaintiff cannot read the writings produced without putting in the entire answer of the defendant, and thus affording him the benefit of any explanation he may have given respecting them. *Smith v. Beaufort*, 1 Hare, 524; *Brown v. Thornton*, 1 Myl. & Cr. 243; *Miller v. Gow*, 1 Y. & C. Ch. 56." Wigr. Disc. § 285.

³ Wigr. Disc. § 294; *Ex parte Shaw*, Jacob, 272; *Morrice v. Swaby*, 2 Beav. 500; *Rodick v. Gandell*, 10 Beav. 270; *Palmer v. Wright*, *Ibid.* 234; *Monseil v. Lindsay*, 13 Ir. Eq. R. 144. Doc-

them with somebody else who is not before the court,¹ and who has an interest in them distinct from his own.² It is incumbent, in such cases, for the plaintiff to make all the persons interested parties to the suit,³ though the plaintiff has the alternative of requiring from the defendant a full statement of the *contents* of such documents.⁴ It has been also held that no valid objection can be taken to an order for the production of memoranda which are admitted by defendant to relate to the matters in dispute, and to be in his possession, on the ground either that he has a lien upon them,⁵ or that they are intermingled with other entries in the same book, to a discovery of which the plaintiff is not entitled, and which cannot be separated or sealed up.⁶

uments pledged by the defendant are not under his control. *Liddell & Norton*, 1 Kay, App. xi. See *Taylor on Ev.* § 1591.

¹ *Murray v. Walter*, Cr. & Ph. 114, 124, 125, per Ld. Cottenham; *Taylor v. Rundell*, Cr. & Ph. 111, per *Ibid.*; *Reid v. Langlois*, 1 M. & Gord. 627, 635-638, per *Ibid.*; 2 Hall & T. 59, 69-72, S. C.; *Morrell v. Wootten*, 13 Beav. 105; *Edmonds v. Ld. Foley*, 31 L. J. Ch. 384, per Romilly, M. R.; 30 Beav. 282, S. C.; *Lopez v. Deacon*, 6 Beav. 254; *Hadley v. MacDou-*

gall, L. R. 7 Ch. Ap. 312; *Penney v. Goode*, 1 Drew. 474; *Wigr. Disc.* § 294; *Taylor's Ev.* § 1538.

² *Glyn v. Caulfeild*, 3 M. & Gord. 463; *Few v. Guppy*, 13 Beav. 457.

³ *Lopez v. Deacon*, 6 Beav. 258, per Ld. Langdale; *Wigr. Disc.* §§ 294, 327.

⁴ *Lopez v. Deacon*, 6 Beav. 258.

⁵ *Lockett v. Cary*, 3 New R. 405, per Romilly, M. R.

⁶ *Taylor's Ev.* § 1607; *Carew v. White*, 5 Beav. 172.

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